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IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 OAKLAND DIVISION

**ELOY ORTIZ OAKLEY, in his official  
 capacity as Chancellor of California  
 Community Colleges; BOARD OF  
 GOVERNORS OF THE CALIFORNIA  
 COMMUNITY COLLEGES; FOOTHILL-  
 DE ANZA COMMUNITY COLLEGE  
 DISTRICT; LOS RIOS COMMUNITY  
 COLLEGE DISTRICT; LOS ANGELES  
 COMMUNITY COLLEGE DISTRICT;  
 STATE CENTER COMMUNITY  
 COLLEGE DISTRICT; SAN DIEGO  
 COMMUNITY COLLEGE DISTRICT,**

Plaintiffs,

**v.**

**BETSY DEVOS, in her official capacity as  
 the United States Secretary of Education;  
 U.S. DEPARTMENT OF EDUCATION,**

Defendants.

Civil Case No. 20-cv-3215-YGR

**FIRST AMENDED COMPLAINT FOR  
 DECLARATORY, INJUNCTIVE, AND  
 MANDAMUS RELIEF**

Judge: Honorable Yvonne Gonzalez  
 Rogers

Trial Date: None Set

Action Filed: May 11, 2020

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1           1.       Plaintiffs Chancellor Eloy Ortiz Oakley, the Board of Governors of the California  
 2       Community Colleges, Foothill-De Anza Community College District, Los Rios Community  
 3       College District, Los Angeles Community College District, State Center Community College  
 4       District, and San Diego Community College District (Plaintiffs) have brought this lawsuit to stop  
 5       the U.S. Department of Education (DoE) from arbitrarily placing eligibility restrictions on  
 6       emergency relief funds that Congress intended to help students defray additional educational  
 7       costs resulting from the COVID-19 pandemic. On March 27, 2020, in response to the  
 8       unprecedented worldwide pandemic that has disrupted every aspect of the economy and everyday  
 9       life, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136,  
 10      134 Stat. 281 (2020) was signed into law. In the CARES Act, Congress created a \$14 billion  
 11      Higher Education Emergency Relief Fund (HEERF) from which the DoE Secretary is required to  
 12      disburse approximately \$12.56 billion, by a precise formula set by Congress, to institutions of  
 13      higher education to prevent, prepare for, and respond specifically to the coronavirus. Pursuant to  
 14      the statutory formula, approximately \$580 million was allocated to community colleges  
 15      throughout California.<sup>1</sup>

16           2.       Congress authorized higher education institutions to use these grants to cover any  
 17      costs associated with significant changes to the delivery of instruction due to the coronavirus  
 18      (HEERF Assistance). Congress required that at least half of each institution's allocation be used  
 19      to provide emergency relief to students for expenses related to campus disruptions (Student  
 20      Assistance), with the remaining portion of funds to be used at the institution's discretion  
 21      (Institution Assistance). In doing so, for both the HEERF Student and Institution Assistance,  
 22      Congress provided higher education institutions with unfettered flexibility to distribute the relief  
 23      to affected students as they deemed appropriate, imposing no eligibility limitations on this  
 24      emergency relief for students.

25           3.       Indeed, DoE at first recognized Congress's intent and acknowledged in an April 9,

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26           <sup>1</sup> California Community Colleges Allocations for Section 18004(a)(1) of the CARES Act,  
 27      California Community Colleges (Apr. 9, 2020), <https://tinyurl.com/y8lskhzg>; *see also* Allocations  
 28      for Section 18004(a)(1) of the CARES Act, U.S. Dep't of Educ., <https://tinyurl.com/rt8hdze> (last  
 visited Nov. 5, 2020).

2020 letter to colleges and universities that HEERF Assistance is available to all students. Likewise, in the Recipient's Funding Certification and Agreement that higher education institutions were required to sign in order to receive their Student Assistance funding allocations (Certification), DoE confirmed that HEERF Assistance funds do not constitute financial aid under Title IV of the Higher Education Act (Title IV). Applying Title IV's eligibility restrictions would exclude not only certain categories of residents who are not U.S. citizens from receiving HEERF Assistance, but also citizens who do not meet other eligibility criteria unrelated to immigration status.

4. On or about April 21, 2020, after a number of colleges within the Plaintiff Districts submitted the required Certifications<sup>2</sup> acknowledging and certifying that they would comply with the terms and conditions of funding, DoE suddenly and inexplicably changed its position. In guidance documents directed to higher education institutions (April 21 Guidances), DoE said that HEERF Assistance is subject to Title IV's eligibility limitations, and specifically stated that higher education institutions cannot use these funds for non-citizens who are ineligible to receive aid under Title IV. Under these eligibility restrictions, hundreds of thousands of California community college students who may be most in need of relief would be deprived of assistance during this public health crisis, including non-citizen students who are Deferred Action for Childhood Arrival (DACA) recipients, Temporary Protected Status recipients, and asylum applicants, as well as substantial numbers of U.S. citizens in the California community college system. DoE's changed position would have likely excluded more than *half* of all students in the California community college system, including many identified as economically disadvantaged, from eligibility to receive HEERF Assistance.

5. In a May 21 CARES Act Update (May 21 Update)<sup>3</sup> on its website and an Interim Final Rule (IFR), 85 Fed. Reg. 36,494 (June 17, 2020), DoE reaffirmed its position that only

<sup>2</sup> The term "Certifications" refers collectively to the Certification for Student Assistance and a similar certification for receipt of the colleges' Institution Assistance allocations.

<sup>3</sup> The May 21 Update is available at <https://www2.ed.gov/about/offices/list/ope/heerfupdates.html>. The May 21 Update, with the April 21 Guidances, are referred to throughout as the HEERF Assistance Guidances.

1 students eligible for financial aid under Title IV may receive emergency HEERF Assistance,  
 2 while also asserting that students who are ineligible to receive federal public benefits under 8  
 3 U.S.C. § 1611 (§ 1611) are precluded from receiving HEERF Assistance.

4 6. As this Court held in preliminarily enjoining DoE's eligibility requirements,  
 5 Congress did not authorize the imposition of these requirements. *See generally* Order Granting  
 6 Pls.' Mot. for Prelim. Inj. at 13-19 (June 17, 2020), ECF No. 44 (PI Order). There is no provision  
 7 of the CARES Act that limits the eligibility of students who may receive HEERF Assistance, that  
 8 incorporates Title IV's eligibility requirements into the HEERF, or that confers discretion to the  
 9 DoE Secretary to set eligibility requirements. Rather, by not placing any limitations on student  
 10 eligibility for HEERF Assistance, by leaving to the discretion of each institution how to distribute  
 11 HEERF Assistance to students, and by requiring that the DoE Secretary allocate HEERF  
 12 Assistance pursuant to a specific formula that accounts for *all* students who were not previously  
 13 enrolled in distance (online) learning before the COVID-19 related shutdowns, Congress  
 14 restricted DoE's authority to set eligibility requirements on that funding. Although Congress  
 15 imposed Title IV limitations and set other eligibility limitations on some funding sources  
 16 described in the CARES Act, it did not do so with respect to HEERF Assistance. Moreover, as  
 17 this Court also ruled, § 1611's general restrictions on who may receive federal public benefits do  
 18 not apply to "the specific, one-time emergency disbursement of HEERF Assistance in the  
 19 CARES Act," and even if they did, HEERF Assistance is not a federal public benefit under  
 20 § 1611. PI Order at 23-24.

21 7. Accordingly, DoE's imposition of eligibility requirements on HEERF Assistance,  
 22 including through the IFR, violates separation of powers principles, is *ultra vires*, and is in excess  
 23 of statutory authority in violation of the Administrative Procedure Act (APA). DoE's  
 24 unexplained and inconsistent interpretations, disregard of congressional intent, reliance on  
 25 unsupported assumptions, flawed costs and benefits analysis, justifications that are contrary to the  
 26 evidence available to DoE at the time it issued the IFR, and failure to consider significant  
 27 ramifications of its eligibility limitations (or *any* of the public comments submitted in response to  
 28 the IFR) also violate the APA's prohibition on arbitrary and capricious agency action. Finally,

DoE's HEERF eligibility requirements violate the Spending Clause of the U.S. Constitution as they: (a) are not related to Congress's purpose for HEERF Assistance; (b) were not unambiguously imposed by Congress; (c) have not provided recipients with a knowing choice based on what is required to comply with the conditions; and (d) were imposed by DoE after a number of colleges in the Plaintiff Districts accepted the terms and conditions of the funding in the Certifications.

8. These eligibility requirements would irreparably harm Plaintiffs and their students at a time when emergency relief is needed immediately. Under HEERF's formula, Plaintiff Districts have collectively been allocated approximately \$114 million, with at least \$57 million of that amount allocated for students. Students at community colleges throughout California have incurred and are continuing to incur increased costs as a result of the sudden and disruptive shift to distance learning systems adopted to keep students, staff, and faculty safe during the pandemic. If Plaintiffs were subject to DoE's eligibility requirements, Plaintiffs' already strained resources would further be challenged by the burdens of finding alternative sources of assistance, not subject to DoE's unlawful preclusions, and distributing much needed assistance to its students consistent with its principles of equity and inclusivity. DoE's restrictions would only serve to increase the likelihood of student dis-enrollment, which not only would harm Plaintiffs' classrooms in the short term, but also their budgets in the long term—undermining their academic missions.

9. For these reasons, and those discussed below, the Court should declare that DoE's eligibility requirements set forth in DoE's HEERF Assistance Guidances and its IFR are unlawful and unconstitutional and permanently enjoin their imposition and enforcement.

### **JURISDICTION AND VENUE**

10. Jurisdiction is proper in this Court under 28 U.S.C. § 1331 because this case arises under the Constitution and the laws of the United States. The Court also has jurisdiction under 28 U.S.C. § 1346 because this is a civil action against the federal government founded upon the U.S. Constitution and acts of Congress. Jurisdiction is proper under the judicial review provisions of the APA, 5 U.S.C. §§ 701-706. An actual controversy exists between the parties within the

1 meaning of 28 U.S.C. § 2201(a), and this Court may grant declaratory injunctive, mandamus, and  
 2 other relief, pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202 (Declaratory  
 3 Judgment Act), the Mandamus Statute, 28 U.S.C. § 1361, and the APA.

4 11. Under 28 U.S.C. § 1391(e)(1), venue is proper in the Northern District of  
 5 California because Plaintiff Foothill-De Anza Community College District has a business address  
 6 at 12345 El Monte Road., Los Altos Hills, CA 94022.

#### 7 **INTRADISTRICT ASSIGNMENT**

8 12. Assignment to the San Francisco or Oakland Divisions of this District is proper  
 9 pursuant to Civil Local Rule 3-2(c)-(d) because Defendant DoE maintains an office in the San  
 10 Francisco Division located at 50 United Nations Plaza, San Francisco, CA 94102.

#### 11 **PARTIES**

12 13. The California Community Colleges system is the largest postsecondary education  
 13 system in the United States, with more than 2.1 million students attending one of 114 college  
 14 campuses annually, and 1.5 million students who enrolled in the Spring 2020 semester. With low  
 15 tuition and a longstanding policy of full and open access, California's community colleges were  
 16 established around the principle that higher education should be available to everyone. The  
 17 community colleges are the most common entry point into collegiate degree programs in  
 18 California; the primary system for delivering career technical education and workforce training; a  
 19 major provider of adult education, apprenticeship, and English as a Second Language courses;  
 20 and a source of lifelong learning opportunities for California's diverse communities.

21 14. The principle of free public education is enshrined in the Constitution of  
 22 California, which mandates a system of free public schools. Cal. Const. art. IX, § 5. The  
 23 California Constitution also sets a minimum funding level for "the moneys to be applied by the  
 24 state for the support of school districts and community college districts." *Id.* art. XVI, § 8(b); *see*  
 25 *also* Cal. Educ. Code § 84750.4 (establishing process for calculating a community college  
 26 district's base and supplemental allocations). The California Community Colleges are  
 27 "postsecondary schools" and are "part of the public school system" of California. Cal. Educ.  
 28 Code § 66700.



1           15. Further, the California Equity in Higher Education Act establishes the policy of the  
2 State of California to afford all persons equal rights and opportunities in postsecondary  
3 educational institutions, including the California Community Colleges. *Id.* § 66251.

4                           **Plaintiffs Chancellor Eloy Ortiz Oakley and Board of Governors**  
5                           **of the California Community Colleges**

6           16. The Board of Governors of the California Community Colleges (Board) sets policy  
7 and provides guidance for the 73 districts that constitute the postsecondary education system of  
8 community colleges. *Id.* § 70900. Board members are appointed by the Governor and formally  
9 interact with state and federal officials, and other state organizations. The Board has  
10 legislatively-granted authority to develop and implement standards for classes, student academic  
11 requirements, and employment of academic and administrative staff. *Id.* §§ 70900; 70901(b).

12           17. The Board appoints a chief executive officer, known as the Chancellor, who  
13 exercises the duties and responsibilities that are delegated to him by the Board. *Id.* § 71090(b).  
14 Plaintiff Eloy Ortiz Oakley has served as Chancellor since December 2016.

15           18. The Chancellor's Office is responsible for carrying out the policies of the Board,  
16 including the development of fiscal plans, a legislative agenda, a budget for the community  
17 college system, and the execution of grants to community college districts to carry out statewide  
18 programs in furtherance of the Board's policies. The Chancellor's delegated authority includes  
19 authority to enter into contracts and grants of up to \$100,000 and three years duration without  
20 Board approval. If there are exigent circumstances, the Chancellor may enter contracts or grants  
21 that exceed these limitations without prior Board approval.

22           19. The Board exercises oversight and fiscal affairs leadership over the California  
23 Community Colleges, including: providing general supervision over community college districts;  
24 providing representation, advocacy, and accountability for the community colleges before state  
25 and national legislative and executive agencies; and administering state and federal support  
26 programs. *Id.* § 70901(b), (b)(4)(A), & (b)(5)(A). The Board is responsible for approving the  
27 system's budget, identifying total revenue needs in order to properly serve the educational  
28 system, and identifying expenditures for the state general apportionment and for categorical



1 programs, new programs, and budget improvements. *Id.* § 70901(b)(5)(A)(i)(I). The Board also  
 2 advises and assists governing boards of community college districts on the implementation and  
 3 interpretation of state and federal laws affecting community colleges. *Id.* § 70901(b)(14).

4 20. The Board’s strategic mission states in part: “All people have the opportunity to  
 5 reach their full educational potential . . . . The Colleges embrace diversity in all its forms . . . . All  
 6 people have the right to access quality higher education.”<sup>4</sup> It is the objective of the California  
 7 Community Colleges to “mak[e] sure students from all backgrounds succeed in reaching their  
 8 goals and improving their families and communities.”<sup>5</sup> In furtherance of these missions, the  
 9 Chancellor’s Office has reassured students and colleges that its campuses will remain safe,  
 10 welcoming places for students of all backgrounds to learn and has defended the right of all  
 11 students to obtain a higher education in California.

12 21. Before the Court issued its PI Order, the Board and the Chancellor’s Office had to  
 13 devote significant time and resources to address the DoE’s imposition of the eligibility  
 14 requirements on HEERF Assistance. The Chancellor’s Office executive team, research team,  
 15 Government Relations Division, College Finance and Facilities Planning Division, and  
 16 Communications Division all were required to respond to the DoE’s actions by analyzing the  
 17 impact of the DoE’s restrictions; providing technical assistance and guidance to community  
 18 colleges, policy-makers, and stakeholders; and conducting research and analysis to develop  
 19 mechanisms to assist the hundreds of thousands of students deprived of the possibility of  
 20 receiving federal assistance under the DoE’s eligibility restrictions. Staff time was diverted from  
 21 other organizational responsibilities to develop responses to DoE’s eligibility requirements.

22 22. The Board and the Chancellor’s Office worked with community college districts to  
 23 alter their disbursement plans in response to the DoE’s eligibility requirements and to determine  
 24 alternative funding for emergency student aid for those students deemed ineligible by DoE. As  
 25 an example, the Chancellor’s Office College Finance and Facilities Planning Division consulted

26 <sup>4</sup> Resolution of the Board of Governors No. 2017-01 (Jan. 2017)  
 27 <https://tinyurl.com/yc8bw6z9> (quoting from strategic plan).

28 <sup>5</sup> *Vision for Success*, California Community Colleges, <https://tinyurl.com/y7dqtcnz> (last visited Nov. 4, 2020).

1 with one college district that was forced, after release of the April 21 Guidances, to divert  
 2 portions of its Student Equity and Achievement (SEA) Program funds from other uses in order to  
 3 keep commitments it had already made to students based on the text of the CARES Act.

4 23. Because the mission and mandate of the California Community Colleges is to  
 5 support and provide low-cost postsecondary education to all, many of its students are among the  
 6 most financially vulnerable in California. In light of this, the Legislature enacted the SEA  
 7 Program, the funding for which the Board administers and distributes. In administering SEA  
 8 Program funding, the Board provides local districts with the vast majority of the appropriations to  
 9 utilize at their discretion, consistent with the Program's conditions. The Legislature sets aside  
 10 five percent of SEA Program funds for discretionary use by the Chancellor's Office to promote  
 11 system-wide initiatives to achieve the goals of the California Community Colleges.<sup>6</sup> These goals  
 12 include reducing achievement gaps across various demographics and increasing the percentage of  
 13 students who succeed in graduating, transferring to four-year colleges, or obtaining certificates.<sup>7</sup>

14 24. The purpose of the SEA Program in particular is to ensure funding to eliminate  
 15 achievement gaps for students from traditionally underrepresented groups to meet the goals set  
 16 out in California Community Colleges' Vision for Success. *See id.*; Cal. Educ. Code  
 17 § 78222(a)(2). In implementing the SEA Program, the California Community Colleges must:  
 18 ensure students complete their educational goals and a defined course of study; provide quality  
 19 curriculum, instruction, and support services to students who enter college deficient in English or  
 20 math; and provide student matriculation services and assistance in developing an education plan,  
 21 among other requirements. *Id.* § 78222(a) & (b). The Legislature's intent in creating the SEA  
 22 Program was to prioritize funding for high-need and disadvantaged students enrolled in the  
 23 California Community College system. *Id.* § 78222(c).

24  
 25 <sup>6</sup> The California Legislature appropriated \$475,220,000 for the SEA Program in 2019.  
 26 2019 Cal. Legis. Serv. Ch. 53 (S.B. 77) (West). Under California Education Code, section  
 27 78222(c)(5)(A), "[t]he chancellor may allocate up to 5 percent of the total funds appropriated for  
 28 the purpose of this program for state administrative operations to carry out the intent of this  
 section."

<sup>7</sup> *See Vision for Success*, Foundation for California Community Colleges,  
<https://vision.foundationccc.org/> (last visited Nov. 4, 2020).

1           25.     Funding for the SEA Program may be used for emergency student financial  
2 assistance to help eligible students overcome unforeseen financial challenges that would directly  
3 impact students' ability to persist in their course of study. *Id.* § 78220(e)(1). Emergency student  
4 financial assistance includes direct aid in the form of emergency grants, as well as housing and  
5 food assistance, textbook grants, and transportation assistance. *Id.* This assistance is available to  
6 any student who has experienced an unforeseen financial challenge, who is making satisfactory  
7 academic progress (as defined by the college the student attends), and who is at risk of not  
8 persisting in the student's course of study due to the unforeseen financial challenge. *Id.*  
9 § 78220(e)(3)(A).

10           26.     If permitted to take effect, DoE's eligibility restrictions would bar hundreds of  
11 thousands of California's community college students from receiving emergency HEERF  
12 Assistance. The Board, as the entity tasked with administering the SEA Program, expects that  
13 local districts would need to access SEA Program funds to fill this gap in emergency assistance,  
14 resulting in depletion of SEA Program funds and preventing their use for other critical  
15 educational and strategic missions. Before the April 21 Guidances, the Chancellor's Office, with  
16 Board approval, had designated these funds toward other priorities, including reducing equity  
17 gaps in achievement among traditionally underrepresented student groups, reducing regional  
18 achievement gaps among colleges located in regions with the lowest educational attainment of  
19 adults, and increasing the percentage of exiting students who are able to find employment in their  
20 field of study. Before the issuance of the PI Order, however, the Chancellor's Office had to  
21 assess whether there were set-aside funds available to provide support to community college  
22 districts in response to DoE's eligibility requirements on HEERF Assistance. The Chancellor's  
23 Office Division of Educational Services and Support also evaluated whether to re-scope grants to  
24 community college districts to alleviate some of the impacts of college district diversions of SEA  
25 and other funds to provide direct emergency aid to non-Title IV or § 1611 eligible students  
26 impacted by COVID-19 to cover the gap in funding caused by DoE's unlawful interpretation of  
27 the CARES Act.

28           27.     Since the issuance of the PI Order, community colleges across the State have used

HEERF Assistance to provide support for students who are facing substantial needs as a result of the pandemic, without regard to whether those students are eligible under Title IV or § 1611. In addition to distributing Student Assistance, colleges throughout the State have used their Institution Assistance to provide both cash and in-kind support for students in the form of laptops, Chromebooks, WiFi connections, and hotspots to access remote learning, as well as mental health services. Without an injunction preventing the enforcement of DoE's eligibility requirements, the Board, Chancellor's Office, and community college districts and colleges throughout the State will be prevented from disbursing HEERF Assistance to students that need it, undermining their educational mission and requiring diversion of resources to assist excluded students. Even if the Board, Chancellor's Office, or districts were to use alternative sources of funding, like the SEA Program funds, to provide emergency relief to students not eligible under DoE's restrictions, including to meet basic housing and food needs that have arisen during this global health pandemic, these funds would not be enough to cover the gap caused by DoE's HEERF eligibility restrictions. Moreover, use of the SEA Program funds will undermine California Community Colleges' Vision for Success objectives, which is what prompted the creation of the SEA Program.

#### **Plaintiff Foothill-De Anza Community College District**

28. Foothill-De Anza Community College District (FDCCD) has provided education for students in the South Bay area for over 50 years. Each year, approximately 64,000 students are enrolled at FDCCD's two colleges: Foothill College and De Anza Community College. FDCCD is committed to student success through equity, inclusion, and innovation. Approximately 80 percent of students at FDCCD are non-white, and almost 25 percent of students receive financial aid.

29. Based on the statutory formula, \$9.6 million in HEERF Assistance funding was allocated to FDCCD's colleges, with a minimum allocation of \$4.8 million for students. Specifically, \$2.4 million in HEERF Assistance funding was allocated to Foothill College, with a minimum allocation of \$1.2 million for students; \$7.2 million in HEERF Assistance funding was allocated to De Anza College, with a minimum allocation of \$3.6 million for students.

1           30.     In accordance with the text of the CARES Act, the initial letter guidance issued by  
2 the DoE on April 9, and the Certification that all higher education institutions were required to  
3 complete in order to access Student Assistance funds, Foothill College developed a plan to ensure  
4 that its entire student body was eligible to receive assistance. Foothill College created a short  
5 questionnaire asking students to identify their needs. Foothill College planned to award amounts  
6 based on students' identified needs.

7           31.     On April 18, before DoE issued its April 21 Guidances, Foothill College accepted  
8 the Certifications required to access HEERF Assistance funds in reliance of the plain text of the  
9 CARES Act, the representations made in DoE's April 9 letter, and the language of the  
10 Certifications, with the expectation that it would be broadly distributing Student Assistance funds  
11 to its students.

12           32.     Once the eligibility restrictions were imposed and before the Court issued its PI  
13 Order, Foothill College was limited to providing HEERF Assistance to under 500 students,  
14 although it had received over 2,400 questionnaires from students. The eligibility restrictions  
15 excluded the majority of students who had completed Foothill College's simple application, but  
16 did not have a Free Application for Student Aid (FAFSA) on file, or because they were strictly  
17 enrolled in online classes.

18           33.     Foothill College did not award any HEERF Assistance to students ineligible under  
19 DoE's eligibility requirements before the issuance of the PI Order. After the Court's issuance of  
20 the PI Order, and in reliance thereof, Foothill College was able to distribute Student Assistance to  
21 students that were excluded under DoE's eligibility restrictions, and is expeditiously continuing to  
22 do so until it exhausts its Student Assistance funding.

23           34.     Before the issuance of the PI Order, Foothill College used other sources of state  
24 funding and fundraising efforts to provide some relief for students excluded by DoE's eligibility  
25 criteria. Foothill College would have to renew those efforts if it was once again subject to DoE's  
26 eligibility restrictions. These alternative funding sources, however, may not be sufficient to meet  
27 the needs of excluded students.

28           35.     In accordance with the text of the CARES Act, the initial letter guidance issued by

1 the DoE on April 9, and the Certification that all higher education institutions were required to  
2 complete in order to access Student Assistance funds, De Anza College developed a plan to  
3 distribute Student Assistance to all students who were affected by disruption to campus  
4 operations because of the coronavirus. De Anza College created a short application asking  
5 students to identify their needs. De Anza College planned to award amounts based on students'  
6 identified needs.

7 36. De Anza College completed the Certifications required of all higher education  
8 institutions to access HEERF Assistance.

9 37. Once the eligibility restrictions were imposed and before the Court issued its PI  
10 Order, De Anza College was limited to providing Student Assistance to only those students who  
11 had submitted an application and had a FAFSA on file. During this time period, De Anza College  
12 conducted a manual review of eligibility for all other students who had completed the application.  
13 Based on its manual review of applications during this time period, De Anza College estimates  
14 that it took staff approximately fifteen minutes to review each application in order to verify all of  
15 the information necessary under DoE's eligibility requirements,

16 38. De Anza College did not award any HEERF Assistance to students ineligible  
17 under DoE's eligibility requirements before the issuance of the PI Order. After the Court's  
18 issuance of the PI Order, and in reliance thereof, De Anza College was able to distribute Student  
19 Assistance to students that were excluded under DoE's eligibility restrictions, and is expeditiously  
20 continuing to do so until it exhausts its Student Assistance funding. De Anza College estimates  
21 that it took staff five minutes to review each application without having to verify all of the  
22 information necessary under DoE's eligibility requirements.

23 39. De Anza College is considering using a portion of its Institution Assistance to  
24 provide assistance to students. If it provides Institution Assistance to students, De Anza College  
25 plans to do so without regard to whether those students are eligible under Title IV or § 1611.

26 40. Before the issuance of the PI Order, De Anza College used other sources of state  
27 funding and fundraising efforts to provide some relief for students excluded by the DoE's  
28 eligibility criteria. De Anza College would have to renew those efforts if it was once again

1 subject to DoE's eligibility restrictions. These alternative sources of funding, however, would not  
2 be sufficient to meet the needs of excluded students.

3 41. Both of FDCCD's colleges have a continued interest in disbursing HEERF  
4 Assistance equitably among its student body, so that its students may continue their education and  
5 FDCCD may continue to fulfill its academic mission.

6 **Plaintiff Los Angeles Community College District**

7 42. Los Angeles Community College District (LACCD) has provided an education to  
8 more than three million students over the past 77 years and is affordable and accessible to all.  
9 LACCD includes nine colleges: Los Angeles Mission College, Pierce College, Los Angeles  
10 Valley College, Los Angeles City College, East Los Angeles College, West Los Angeles College,  
11 Los Angeles Southwest College, Los Angeles Trade-Technical College, and Los Angeles Harbor  
12 College. LACCD welcomes a diverse student population and provides them with the skills,  
13 knowledge, and upward mobility to succeed. Over 55 percent of students enrolled in LACCD are  
14 Hispanic and nearly 10 percent of students are African American. Eighty percent of LACCD  
15 students are from underserved populations. Over half of students enrolled in LACCD are either  
16 low income or below the poverty line and a 2016 survey indicated that 55 percent of students are  
17 experiencing housing insecurity and 63 percent face food insecurity.

18 43. Based on the statutory formula, \$45.2 million in HEERF Assistance funding was  
19 allocated to LACCD's colleges, with a minimum allocation of \$22.6 million for students. In  
20 accordance with the text of the CARES Act and the initial letter guidance issued by the DoE on  
21 April 9, LACCD developed a plan for its nine colleges to distribute Student Assistance grants to  
22 all recipients of the California Promise Grant (CPG) enrollment fee waiver. Cal. Educ. Code  
23 § 76300(g).

24 44. All of LACCD's colleges completed the Certifications required of all higher  
25 education institutions to access HEERF Assistance.

26 45. Once the eligibility restrictions were imposed and before the Court issued its PI  
27 Order, LACCD shifted its eligibility model from CPG recipients to FAFSA-eligible students  
28 under Title IV, which reduced the number of low-income students eligible for HEERF Assistance



1 by 9,000.

2 46. LACCD did not award any HEERF Assistance to students ineligible under DoE's  
3 eligibility requirements before the issuance of the PI Order. After the Court's issuance of the PI  
4 Order, and in reliance thereof, LACCD was able to distribute millions in Student Assistance to  
5 students who were previously excluded under DoE's eligibility restrictions and is expeditiously  
6 continuing to do so until it exhausts its Student Assistance funding.

7 47. LACCD's colleges have used and plan to continue to use their Institution  
8 Assistance to provide assistance to students. For example, LACCD's colleges have used  
9 Institution Assistance to purchase Chromebooks or laptops for hundreds of students, without  
10 regard to whether those students are eligible under Title IV or § 1611.

11 48. Before the issuance of the PI Order, LACCD and its nine colleges used private  
12 fundraising efforts to provide some relief for students excluded by the DoE's eligibility  
13 criteria. LACCD would have to renew those efforts if it was once again subject to DoE's  
14 eligibility restrictions. These alternative funding sources, however, are not predictable revenue  
15 streams and would not be sufficient to meet the needs of excluded students.

16 49. LACCD continues to have an interest in disbursing HEERF Assistance equitably  
17 among its student body, so that its students may continue their education and LACCD may  
18 continue to fulfill its academic mission.

19 **Plaintiff Los Rios Community College District**

20 50. Los Rios Community College District (LRCCD) is the second-largest community  
21 college district in California, serving nearly 75,000 students throughout the Sacramento region.  
22 LRCCD consists of American River College, Cosumnes River College, Folsom Lake College,  
23 and Sacramento City College. LRCCD offers a wide array of degree, transfer, and certificate  
24 programs at its four colleges and six resource centers. Nearly two-thirds of LRCCD's student  
25 body is non-white and qualify as either low income or below the poverty line.

26 51. Based on the statutory formula, approximately \$27 million in HEERF Assistance  
27 funding was allocated to LRCCD's colleges, with a minimum allocation of \$13.5 million for  
28 students. In accordance with the text of the CARES Act, the initial letter guidance issued by the

1 DoE on April 9, and the Certification that all higher education institutions were required to  
2 complete in order to access Student Assistance funds, LRCCD developed an initial plan for its  
3 four colleges to distribute Student Assistance grants to all recipients of the CPG enrollment fee  
4 waiver. This plan was intended to provide support to approximately 58,000 students, about 70  
5 percent of the district's total student enrollment, and focused on those with demonstrated  
6 financial need. This group of students included undocumented students, DACA recipients, foster  
7 youth, single parents, veterans, and students who were not able to meet academic progress  
8 metrics, among others.

9 52. In order to serve these students, following DoE's direction in the April 9 letter, all  
10 of LRCCD's colleges completed the required Certifications as soon as possible, before DoE  
11 issued its April 21 Student Assistance Guidance. Each of the colleges accepted the Certifications  
12 required to access HEERF Assistance funds in reliance of the plain text of the CARES Act,  
13 representations made in DoE's April 9 letter and the language of the Certifications, with the  
14 expectation that the colleges would follow LRCCD's plan for broadly distributing HEERF  
15 Assistance funds to its students, without regard to Title IV's or § 1611's eligibility limitations.

16 53. Once DoE's HEERF eligibility restrictions were imposed, and before the Court  
17 issued its PI Order, LRCCD shifted its eligibility model from CPG recipients to only FAFSA  
18 recipients. Under this model, LRCCD was limited to providing Student Assistance to  
19 approximately 21,000 students.

20 54. LRCCD did not award any HEERF Assistance to students ineligible under DoE's  
21 eligibility requirements before the issuance of the PI Order. After the Court's issuance of the PI  
22 Order, and in reliance thereof, LRCCD was able to distribute Student Assistance to students  
23 previously excluded by DoE's eligibility restrictions and is expeditiously continuing to do so until  
24 it exhausts its Student Assistance funding.

25 55. LRCCD's colleges have used and plan to continue using their Institution  
26 Assistance to provide assistance to students. After the Court's issuance of the PI Order, and in  
27 reliance thereof, LRCCD's colleges used their Institution Assistance portions to provide  
28 thousands of students with internet and laptops to support them in participating in remote

1 learning, without regard to whether those students are eligible under Title IV or § 1611.

2 56. Before the issuance of the PI Order, LRCCD used other sources of state funding  
3 and philanthropic fundraising efforts to provide some relief for students excluded by the DoE's  
4 eligibility criteria. LRCCD would have to renew those efforts if it was once again subject to  
5 DoE's eligibility restrictions. These alternative funding sources, however, would not be sufficient  
6 to meet the needs of excluded students.

7 57. LRCCD has a continued interest in disbursing HEERF Assistance equitably  
8 among its student body, so that its students may continue their education and LRCCD may  
9 continue to fulfill its academic mission.

#### 10 **Plaintiff State Center Community College District**

11 58. State Center Community College District (SCCCD) serves more than 5,743 square  
12 miles of urban and rural communities, including most of Fresno and Madera counties, and  
13 portions of Kings and Tulare counties. SCCCDD currently includes four colleges: Fresno City  
14 College, Reedley College, Madera Community College, and Clovis Community College. On July  
15 20, 2020, Madera Community College was awarded full college status and approved to operate as  
16 California's newest community college. Prior to July 20, Madera Community College had  
17 operated as an extension of Reedley College as a community college center. Over 67,000  
18 students are enrolled in SCCCDD and approximately 78 percent of the SCCCDD student population  
19 is non-white. Over 59 percent of SCCCDD's student population is Hispanic and 10 percent of the  
20 student population is Asian/Pacific Islander. The four counties in SCCCDD's service area include  
21 a higher percentage of low income population than statewide. The SCCCDD's mission is to  
22 provide safe, inclusive, and supporting learning environments that is accessible to all students  
23 within the region. SCCCDD is committed to providing an environment that cultivates, embraces,  
24 and celebrates diversity.

25 59. Based on the statutory formula, \$18.33 million in HEERF Assistance funding was  
26 allocated to SCCCDD's then-three colleges, with a minimum allocation of \$9.167 million for  
27 students. Specifically, \$11.22 million in HEERF Assistance funding was allocated to Fresno City  
28 College, with a minimum allocation of \$5.61 million for students; \$4.24 million in HEERF

1 Assistance funding was allocated to Reedley College and Madera Community College, with a  
2 minimum allocation of \$2.12 million for students; \$2.87 million in HEERF Assistance funding  
3 was allocated to Clovis Community College, with a minimum allocation of \$1.435 million for  
4 students.

5 60. SCCCDC directed its colleges to create their own criteria to administer the Student  
6 Assistance funding. In accordance with the text of the CARES Act, the initial letter guidance  
7 issued by the DoE on April 9, and the Certifications that all higher education institutions were  
8 required to complete in order to access Student Assistance funds, Fresno City College, Reedley  
9 College (including Madera Community College), and Clovis Community College created  
10 extensive plans for distributing Student Assistance grants in an equitable manner.

11 61. Fresno City College initially identified 16,457 students to whom it would provide  
12 Student Assistance after conducting extensive research that took into account whether a student  
13 received Pell grants or is otherwise Pell-grant eligible, family income, student income, and impact  
14 based on zip code. Indeed, Fresno City College prepared reports on how best to distribute funds  
15 to the most needful students.

16 62. On April 14, before DoE issued its April 21 Guidances, Fresno City College  
17 accepted the Certifications required to access HEERF Assistance funds in reliance of the plain  
18 language in the CARES Act, representations made in DoE's April 9 letter, and the language of  
19 the Certifications, with the expectation that it would follow this plan for broadly distributing  
20 HEERF Assistance funds to its students, without regard to Title IV's or § 1611's eligibility  
21 limitations. Once DoE's HEERF eligibility restrictions were imposed and before the Court issued  
22 its PI Order, Fresno City College was limited to providing Student Assistance to only 8,090  
23 students.

24 63. Fresno City College did not award any HEERF Assistance to students ineligible  
25 under DoE's eligibility requirements before the issuance of the PI Order. After the Court's  
26 issuance of the PI Order, and in reliance thereof, Fresno City College was able to distribute  
27 Student Assistance to students that were excluded under DoE's eligibility restrictions, and is  
28 expeditiously continuing to do so until it exhausts its Student Assistance funding.

1           64.     Fresno City College has used and plans to continue using its Institution Assistance  
2 to provide assistance to students. After the Court's issuance of the PI Order, and in reliance  
3 thereof, Fresno City College used a portion of its Institution Assistance to provide hundreds of  
4 students with cash assistance, internet and laptops to support them in participating in remote  
5 learning, without regard to whether those students are eligible under Title IV or § 1611.

6           65.     Before the issuance of the PI Order, Fresno City College used fundraising efforts  
7 to provide some relief for students excluded by the DoE's eligibility criteria. Fresno City College  
8 would have to renew those efforts if it was once again subject to DoE's eligibility restrictions.  
9 These alternative funding sources, however, would not be sufficient to meet the needs of  
10 excluded students.

11           66.     Reedley College initially identified 7,100 students attending Reedley College and  
12 Madera Community College Center to whom it would provide Student Assistance grants without  
13 regard to whether they qualify for Title IV or § 1611. On April 13, before DoE issued its April  
14 21 Guidances, Reedley College accepted the Certifications required to access HEERF Assistance  
15 funds in reliance of the plain language in the CARES Act, representations made in DoE's April 9  
16 letter, and the language of the Certifications, with the expectation that it would follow this plan  
17 for broadly distributing HEERF Assistance funds to its students, without regard to Title IV's or  
18 § 1611's eligibility limitations.

19           67.     Once the eligibility restrictions were imposed and before the Court issued its PI  
20 Order, Reedley College was not only delayed by approximately two weeks in disbursing Student  
21 Assistance grants, but was limited to providing Student Assistance to only 3,775 students. It  
22 additionally conducted a manual review of all other students for FAFSA-eligibility in an attempt  
23 to assist more students, which proved to be time-consuming and resource intensive.

24           68.     Reedley College did not award any HEERF Assistance to students ineligible under  
25 DoE's eligibility requirements before the issuance of the PI Order. After the Court's issuance of  
26 the PI Order, and in reliance thereof, Reedley College was able to distribute Student Assistance to  
27 students attending Reedley College that were excluded under DoE's eligibility restrictions.  
28 Reedley College completed its distribution of its portion of Student Assistance as of October

1 2020.

2 69. Reedley College has used and plans to continue using its Institution Assistance to  
3 provide assistance to students. After the Court's issuance of the PI Order, and in reliance thereof,  
4 Reedley used a portion of its Institution Assistance to provide hundreds of students with internet  
5 and laptops to support them in participating in remote learning, without regard to whether those  
6 students are eligible under Title IV or § 1611. Additionally, Reedley College intends to set aside  
7 Institutional Assistance to provide cash grants to Reedley College students.

8 70. Reedley College used fundraising efforts to provide some relief for students  
9 excluded by the DoE's eligibility criteria. Reedley College would have to renew those efforts if it  
10 was once again subject to DoE's eligibility restrictions. The alternative funding sources,  
11 however, would not be sufficient to meet the needs of excluded students.

12 71. Because Madera Community College operated as a center and an extension of  
13 Reedley College until July of 2020, Reedley College distributed Student Assistance funds to  
14 students attending Madera Community College. In reliance upon and in accordance with the  
15 terms of the PI Order, Reedley College distributed Student Assistance funds to Madera  
16 Community College students who had been excluded under DoE's eligibility restrictions.  
17 Reedley College completed its distribution of Student Assistance to Madera Community College  
18 students as of October 2020.

19 72. In contrast to Student Assistance funds, Institutional Assistance funds were  
20 allocated directly to, and distributed by, Madera Community College. After the Court's issuance  
21 of the PI Order, and in reliance thereof, Madera Community College has used a portion of its  
22 Institution Assistance to provide hundreds of students with cash assistance, internet, and laptops  
23 to support them in participating in remote learning, without regard to whether those students are  
24 eligible under Title IV or § 1611. Madera Community College intends to continue using  
25 Institutional Assistance to assist students.

26 73. Clovis Community College initially developed a three-tier plan through which it  
27 identified approximately 6,500 students to whom it would provide Student Assistance grants.  
28 This plan would have provided support to all students without regard to whether they would

1 qualify under Title IV or § 1611.

2 74. On April 16, before DoE issued its April 21 Guidances, Clovis Community  
3 College accepted the Certifications required to access HEERF Assistance in reliance of the plain  
4 language in the CARES Act, representations made in DoE's April 9 letter, and the language of  
5 the Certifications, with the expectation that it would follow this plan for broadly distributing  
6 HEERF Assistance funds to its students, without regard to Title IV's or § 1611's eligibility  
7 limitations.

8 75. Once DoE's HEERF eligibility restrictions were imposed and before the Court  
9 issued its PI Order, Clovis Community College was limited to providing Student Assistance to  
10 only 1,975 students.

11 76. Clovis Community College did not award any HEERF Assistance to students  
12 ineligible under DoE's eligibility requirements before the issuance of the PI Order. After the  
13 Court's issuance of the PI Order, and in reliance thereof, Clovis Community College was able to  
14 distribute Student Assistance to students that were excluded under DoE's eligibility restrictions.  
15 Clovis completed its distribution of its portion of Student Assistance as of October 2020.

16 77. Clovis Community College has used and plans to continue using its Institution  
17 Assistance to provide assistance to students. After the Court's issuance of the PI Order, and in  
18 reliance thereof, Clovis used a portion of its Institution Assistance to provide students with cash  
19 assistance as well as internet and laptops to support them in participating in remote learning,  
20 without regard to whether those students are eligible under Title IV or § 1611.

21 78. Before the issuance of the PI Order, Clovis Community College used fundraising  
22 efforts to provide some relief for students excluded by the DoE's eligibility criteria. Clovis  
23 Community College would have to renew those efforts if it was once again subject to DoE's  
24 eligibility restrictions. These alternative funding sources, however, would not be sufficient to  
25 meet the needs of excluded students.

26 79. SCCC's colleges have a continued interest in disbursing HEERF Assistance  
27 equitably among its student body, so that its students may continue their education and SCCC  
28 may continue to fulfill its academic mission.



**San Diego Community College District**

80. San Diego Community College District (SDCCD) serves approximately 100,000 students annually. SDCCD is a multicultural institution committed to access and success for all students. SDCCD includes three colleges: San Diego City College, Mesa College, and Miramar College, and has seven campuses that provide Continuing Education. SDCCD offers associate degrees and career technical certificates, as well as a bachelor's degree in Health Information Management. SDCCD and its graduates have a combined economic benefit to its region of \$5.5 billion annually and 98 percent of the District's students remain in the region after completing their education. Within SDCCD's colleges, approximately 69 percent of students enrolled in SDCCD are non-white; 39 percent are Latinx. Twenty-eight percent are first generation college students. Over half of SDCCD's students report income of less than \$33,000 a year, with at least 17 percent reporting less than \$3,000 a year. In the Continuing Education program, approximately 61 percent are non-white; 25 percent identified as Latinx or Mexican; and 34 percent have a primary language other than English. Seventy-six percent of Continuing Education students report income less than \$33,000, 46 percent report less than \$3,000, and 37 percent record an income of zero.

81. Based on the statutory formula, \$13.7 million in HEERF Assistance funding was allocated to SDCCD's colleges, with a minimum allocation of \$6.87 million for students. In accordance with the text of the CARES Act and the initial letter guidance issued by the DoE on April 9, SDCCD developed a plan for its three colleges and Continuing Education program to distribute Student Assistance grants to a range of students, specifically including students enrolled in no-credit continuing education programs, as well as undocumented and DACA students.

82. After SDCCD decided on an allocation plan for HEERF Assistance, SDCCD became aware of DoE's April 21 Guidances imposing new eligibility restrictions on students' access to Student Assistance, which caused confusion in the District. As a result of this change and before the Court issued its PI Order, SDCCD colleges were unable to disburse HEERF student emergency assistance to many of its most impacted students.

83. SDCCD's colleges submitted the Certifications required to obtain their shares of

1 HEERF Assistance funds while attempting to understand the impact of DoE's April 21 Guidances  
2 on their plans for disbursing student emergency assistance.

3 84. SDCCD did not award any HEERF Assistance to students ineligible under DoE's  
4 eligibility requirements before the issuance of the PI Order. After the Court's issuance of the PI  
5 Order, and in reliance thereof, SDCCD was able to distribute Student Assistance to students that  
6 were excluded under DoE's eligibility restrictions, and is expeditiously continuing to do so until it  
7 exhausts its Student Assistance funding

8 85. SDCCD's colleges have used and plan to continue using their Institutional  
9 Assistance to provide assistance to students. For example, SDCCD's colleges have used  
10 Institutional Assistance to purchase course materials, docking stations, internet access, web  
11 cameras, laptops, and monitors for thousands of students without regard to whether those students  
12 are eligible under Title IV or § 1611.

13 86. Before the issuance of the PI Order, SDCCD and its colleges used fundraising  
14 efforts to provide some relief for students excluded by the DoE's eligibility criteria. SDCCD  
15 would have to renew those efforts if it was once again subject to DoE's eligibility restrictions.  
16 These alternative funding sources, however, would not be sufficient to meet the needs of  
17 excluded students.

18 87. Conditions related to the novel coronavirus have negatively impacted students'  
19 ability to participate in their courses. SDCCD's colleges and programs have seen increased  
20 withdrawals compared to last year. SDCCD fears that its inability to assist all of its students if  
21 subject to DoE's eligibility requirements would result in more of its students dis-enrolling, which  
22 will in turn impact SDCCD's revenues.

23 88. SDCCD continues to have an interest in disbursing HEERF Assistance equitably  
24 among its student body, so that its students may continue their education and SDCCD may  
25 continue to fulfill its academic mission.

26 **Defendants**

27 89. Defendant DoE is an executive department of the United States of America  
28 pursuant to 5 U.S.C. § 101, a federal agency within the meaning of 28 U.S.C. § 2671, and has

engaged in agency action within the meaning of 5 U.S.C. § 702. DoE is responsible for administering the HEERF.

90. Defendant Betsy DeVos is the Secretary of the Department of Education. She is sued in her official capacity pursuant to 5 U.S.C. § 702. Secretary DeVos is required to distribute HEERF Assistance in accordance with the CARES Act.

## FACTUAL ALLEGATIONS

### I. THE COVID-19 PANDEMIC HAS CAUSED AN IMMEDIATE NEED FOR ADDITIONAL FINANCIAL ASSISTANCE FOR THE DISTRICTS' DIVERSE STUDENT BODIES

91. The COVID-19 pandemic is a public health emergency that has disrupted nearly every facet of daily American life. Our country's educational institutions have had to respond urgently to the crisis and take far-reaching measures to protect the health and safety of their students and staff. Many colleges and universities throughout the country, including in California, closed their campuses and shifted primarily to remote learning. As of May 2020, more than 4,000 institutions of higher education nationwide were impacted and over 25 million students affected by COVID-19.<sup>8</sup>

92. Like other educational institutions, all of the California community colleges transitioned to online instruction and implemented social distancing and other safety protocols for necessary in-person services. The Chancellor's Office and the community colleges have made significant efforts to address the severe disruptions experienced by students to enable them to meaningfully participate in online instruction. For instance, the Chancellor's Office has worked with the telecommunications industry to provide internet services at no, or reduced, cost and computers for students who need them. Unmet technology needs remain, however.

93. The uncertainty and economic stress caused by COVID-19 has impacted California's community college students particularly acutely. Because of the California Community College system's commitment to free and low cost tuition, many of its students do not have adequate resources to adapt to the changes the crisis has wrought. Pandemic-induced

<sup>8</sup> *COVID-19: Higher Education Resource Center*, Entangled Solutions, <https://tinyurl.com/y8wazqw2> (last visited Nov. 2, 2020).

1 conditions hinder students' efforts to continue their education and put them at higher risk for dis-  
2 enrollment.

3 94. Because of campus closures, students find themselves in remote learning  
4 environments that are overcrowded or otherwise not conducive to attending class, such as shared  
5 bedrooms or family kitchens. The shift to remote learning also presents additional costs,  
6 beginning with access to robust internet connections and laptop computers, and extending to day-  
7 to-day costs resulting from increased time at home.

8 95. Away from their college communities, students are struggling to receive the  
9 instructional support they need to learn while also grappling with significant economic struggles.  
10 Negotiating these challenges can be overwhelming for students.

11 96. The sudden closures separated students from their communities—friends, faculty,  
12 and advisors who have been part of their support network. These experiences compound the  
13 already difficult circumstances faced by low-income students as they lose access to mental health  
14 resources they might have had on their campuses, without access to extra finances to afford  
15 outside mental health treatment.

16 97. If not for the Court's preliminary injunction, DoE's actions would have prevented  
17 students in dire need from accessing funds that help them bridge the gap of unforeseen expenses  
18 caused by the pandemic so that they may continue their education despite significant obstacles. If  
19 California's community colleges were once again subject to DoE's eligibility requirements,  
20 community college students in the State who could not bridge the gap themselves would have to  
21 withdraw or dis-enroll from college altogether. These students (and their families) have invested  
22 effort and financial resources into building their lives and potential futures. Without emergency  
23 HEERF Assistance, they would be forced into momentous and premature decisions about their  
24 educational and professional paths that would have a lasting effect on their lives.

25 **II. CONGRESS CREATED THE HEERF IN THE CARES ACT AS A FORMULA GRANT FOR**  
26 **HIGHER EDUCATION INSTITUTIONS TO ASSIST STUDENTS WITH EMERGENCY COSTS**  
**INCURRED DURING THIS PUBLIC HEALTH CRISIS**

27 98. To respond to these needs, Congress appropriated \$30.75 billion in the CARES  
28 Act toward the Education Stabilization Fund "to prevent, prepare for, and respond to coronavirus,

domestically or internationally.” 134 Stat. at 564. These funds were designated as “emergency requirement[s]” under section 251(b)(2)(A)(i) of the Balanced Budget and Emergency Deficit Control Act of 1985. *Id.*

99. Within the Education Stabilization Fund, Congress created a new program: the Higher Education Emergency Relief Fund (HEERF). Congress reserved 90 percent of HEERF, approximately \$12.56 billion, to be allocated to colleges and universities in accordance with a specific funding formula. *Id.* at 564, § 18001 & 567, § 18004(a)(1). The HEERF Assistance funding formula requires the Secretary to allocate funds to each higher education institution as follows: 75 percent based on its relative share of the full-time equivalent (FTE) enrollment of Federal Pell Grant recipients and 25 percent based on its relative share of FTE enrollment of all other students, excluding in both categories students enrolled only in distance learning before the coronavirus emergency. *Id.* at 567, § 18004(a)(1). Thus, the latter part of the formula accounts for *all* students not previously enrolled in online learning, including those students who are not eligible for financial aid under Title IV of the Higher Education Act or § 1611. Congress directed that the DoE Secretary “shall allocate” this \$12.56 billion to “each institution of higher education to prevent, prepare for, and respond to coronavirus” based on this formula. *Id.* at 567, § 18004(a)(1).

100. The CARES Act broadly allows higher education institutions to use HEERF Assistance “to cover *any* costs associated with significant changes to the delivery of instruction due to the coronavirus.” *Id.* at 568, § 18004(c) (emphasis added). As Senator Lamar Alexander (R-TN) explained, the funding in the CARES Act for higher education institutions is structured in the form of a “block grant.” 166 Cong. Rec. S1895 (Mar. 22, 2020). This “permits the states to administer the program[] with minimal federal involvement and few procedural requirements.” *Rural Alaska Cmty. Action Program v. Smith*, 847 F.2d 535, 536 (9th Cir. 1988).

101. The CARES Act subjects higher education institution recipients of HEERF Assistance to only two conditions. First, the funds cannot be used for “payment to contractors for the provision of pre-enrollment recruitment activities; endowments; or capital outlays associated with facilities related to athletics, sectarian instruction, or religious worship.” 134 Stat. at 564,

§ 18004(c). Second, at least 50 percent of the funds must be used “to provide emergency financial aid grants to students for expenses related to the disruption of campus operations due to coronavirus (including eligible expenses under a student’s cost of attendance, such as food, housing, course materials, technology, health care, and child care)”—referred to here as Student Assistance. *Id.* A higher education institution may use the remaining funds for any purpose associated with the “significant changes to the delivery of instruction due to the coronavirus,” which could include reimbursement for expenses incurred by the institution or additional assistance to students—referred to here as Institution Assistance. *Id.*

102. Other than those provisions, the CARES Act does not set out any requirements on how each institution must allocate HEERF Assistance funds. Congress spoke clearly when it intended to set eligibility criteria for other programs in the CARES Act. *See, e.g., id.* at 335, § 6428(d) (excluding “nonresident alien[s]” and other enumerated individuals from receiving rebates). In contrast, no provision of the CARES Act limits the eligibility of students who may receive HEERF Assistance, including with respect to immigration status or Title IV financial aid eligibility. The only HEERF provision mentioning Title IV refers just to utilization of DoE’s existing grant management system to distribute aid. *Id.* at 567, § 18004(b). Moreover, Congress treated Student Assistance differently from other student financial aid funding sources in the CARES Act, which are subject to Title IV’s eligibility requirements. *See id.* at 396-97, § 3504 (permitting the use of an institution’s allotment under Title IV to issue emergency financial aid grants to students); *see also id.* at 397, § 3505 (authorizing higher education institutions to use Title IV funds to make payments to affected work-study students).

### **III. DOE ISSUED CONFLICTING INTERPRETATIONS ON HEERF ASSISTANCE ELIGIBILITY, AND ULTIMATELY RESTRICTED ELIGIBILITY IN A MANNER NOT INTENDED BY CONGRESS**

103. At first, after the CARES Act became law, DoE implemented the HEERF consistent with Congress’s intent. On April 9, 2020, DoE announced the availability of \$12.56 billion in HEERF Assistance funds, including \$6.28 billion for Student Assistance formula

1 grants.<sup>9</sup> DoE announced that the formula allocations were based on data from the Integrated  
 2 Postsecondary Education System (IPEDS) and Federal Student Aid (FSA).<sup>10</sup> In determining  
 3 allocations pursuant to the portion of the formula involving non-Federal Pell Grant recipients,  
 4 DoE correctly utilized enrollment data that did not exclude students who are ineligible for Title  
 5 IV financial aid or federal public benefits under § 1611.<sup>11</sup>

6 104. On that same day, the DoE Secretary wrote a letter to colleges and universities  
 7 explaining that the institutions have “significant discretion” on how to allocate the Student  
 8 Assistance to students, and that “each institution may develop its own system and process for  
 9 determining how to allocate these funds, which may include distributing the funds to *all* students  
 10 or only to students who demonstrate significant need.”<sup>12</sup> Relying directly on the text of the  
 11 CARES Act, the Secretary stated that “[t]he only statutory requirement is that the funds be used  
 12 to cover expenses related to the disruption of campus operations due to coronavirus (including  
 13 eligible expenses under a student’s cost of attendance, such as food, housing, course materials,  
 14 technology, health care, and child care).” *Id.*

15 105. According to the letter, in order to access both the Student and Institution  
 16 Assistance funds, each higher education institution would be required to sign and return  
 17 Certifications acknowledging and certifying that the institution will comply with the terms and  
 18 conditions of funding. *Id.* The Certifications also made available on April 9, 2020, provide that  
 19 recipient institutions must allocate the funding in a manner “consistent with all applicable laws”  
 20 and also may be subject to penalties for failure to comply with the CARES Act “or any other

21 <sup>9</sup> *Secretary DeVos Rapidly Delivers More Than \$6 Billion in Emergency Cash Grants for*  
 22 *College Students Impacted by Coronavirus Outbreak*, U.S. Dep’t of Educ. (Apr. 9, 2020),  
<https://tinyurl.com/y73bnxd4>.

23 <sup>10</sup> *Id.*; see also Allocations for Section 18004(a)(1) of the CARES Act, U.S. Dep’t of  
 24 Educ., <https://tinyurl.com/rt8hdze> (last visited Nov. 2, 2020).

25 <sup>11</sup> See Methodology for Calculating Allocations per Section 18004(a)(1) of the CARES  
 26 Act, U.S. Dep’t of Educ., <https://tinyurl.com/ybvuxzu8> (identifying use of data from Integrated  
 27 Postsecondary Education Data System (IPEDS) system) (last visited Nov. 2, 2020); IPEDS Data  
 28 Explorer, Nat’l Ctr. for Educ. Statistics, <https://tinyurl.com/yaonr6cq> (aggregate IPEDS data,  
 including category for “nonresident alien” students) (last visited Nov. 2, 2020).

<sup>12</sup> Secretary DeVos Letter to College and University Presidents, U.S. Dep’t of Educ. (Apr.  
 9, 2020), <https://tinyurl.com/y7f9tlrk> (emphasis added).



applicable law.”<sup>13</sup> The Certification for Student Assistance additionally and explicitly states, consistent with Congress’s intent and the Secretary’s April 9 letter, that the “Secretary does not consider these individual emergency financial aid grants to constitute Federal financial aid under Title IV of the HEA.” *Id.* By distinguishing Student Assistance from regular federal financial aid, the Certification indicates that requirements under Title IV are inapplicable to Student Assistance.

106. On or about April 21, 2020, DoE drastically changed its interpretation of the CARES Act without acknowledging its prior position. DoE published a Frequently Asked Questions document on HEERF Student Assistance Guidance.<sup>14</sup> This April 21 Student Assistance Guidance imposes a limitation on eligibility for Student Assistance, stating, “[o]nly students who are or could be eligible to participate in programs under Section 484 in Title IV of the Higher Education Act of 1965, as amended (HEA), may receive emergency financial aid grants.” *Id.* at 4. The April 21 Student Assistance Guidance expressly mentions that only U.S. citizens or “eligible noncitizens” may receive funding. *Id.* A similar guidance for the Institution Assistance funds issued on or about the same date (April 21 Institution Assistance Guidance, with April 21 Student Assistance Guidance, the April 21 Guidances defined *supra* at 2), contains the same limitations on eligibility for emergency financial assistance grants to students.<sup>15</sup>

107. DoE reaffirmed this new position after April 21. A spokesperson for DoE insisted that “the CARES Act makes clear that this taxpayer funded relief should be targeted to U.S. citizens.”<sup>16</sup> On April 27, the DoE Secretary said that DACA recipients are not eligible for

<sup>13</sup> Recipient’s Funding Certification and Agreement: Emergency Financial Aid Grants to Students under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, U.S. Dep’t of Educ., <https://tinyurl.com/y8j7m8t3> (last visited Nov. 2, 2020).

<sup>14</sup> *Higher Education Emergency Relief Fund*, Frequently Asked Questions about the Emergency Financial Aid Grants to Students under Section 18004 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, U.S. Dep’t of Educ., <https://tinyurl.com/yajnjpr2> (last visited Nov. 2, 2020).

<sup>15</sup> *Higher Education Emergency Relief Fund*, Frequently Asked Questions about the Institutional Portion of the Higher Education Emergency Relief Funds under Section 18004(a)(1) and 18004(c) of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, U.S. Dep’t of Educ., <https://tinyurl.com/ya25f2k7> (last visited Nov. 2, 2020).

<sup>16</sup> Brendan Cole, *Who Is Eligible for the Emergency Financial Aid Grant From the*

1 Student Assistance because they are not eligible for financial aid under Title IV.<sup>17</sup>

2 108. On or about May 21, 2020, after Plaintiffs filed the instant action and their motion  
3 for preliminary injunction, DoE published an “updated statement” on its website about its  
4 eligibility requirements (May 21 Update).<sup>18</sup> Although DoE claimed in that statement that it “will  
5 not initiate any enforcement action based solely” on the statements in the April 21 HEERF  
6 Guidances, it also “reiterate[d]” its position that Student Assistance “may *only*” be given to  
7 students eligible under Title IV, and that “the underlying statutory terms in the CARES Act are  
8 legally binding.” *Id.*

9 109. Moreover, in the May 21 Update, DoE asserted, for the first time, that § 1611 was  
10 applicable law as to HEERF Assistance and that its restrictions apply. Section 1611 provides that  
11 certain non-citizens are “not eligible for any Federal public benefit,” subject to exceptions.

12 110. On June 17, 2020, DoE issued the IFR that confirmed the imposition of the  
13 Title IV and § 1611 eligibility requirements on HEERF Assistance.<sup>19</sup> While the May 21 Update  
14 indicated that Title IV’s eligibility requirements do not apply to the Institution Assistance portion  
15 of the funds, no such distinction was made in the IFR. At no point since May 21 has DoE  
16 indicated that § 1611’s eligibility restrictions only apply to Student Assistance. During the course  
17 of briefing and oral arguments in this litigation, DoE has indicated that it takes the position that  
18 § 1611’s restrictions apply to all HEERF Assistance.

19 111. DoE issued the IFR without first publishing a proposed rule for public comment,  
20 and made it effective immediately upon issuance. 85 Fed. Reg. at 36,495. The IFR asserts that  
21 DoE had “good cause” for issuing the IFR without public comments due to the “urgent economic  
22 challenges facing many students as a result of the crisis.” *Id.* at 36,498. The IFR invited the  
23 public to submit comments in response, which were due on July 17, 2020. *See id.* at 36,494.

24 *Department of Education?*, Newsweek (Apr. 24, 2020), <https://tinyurl.com/y86qn83j>.

25 <sup>17</sup> *Education Secretary Betsy DeVos says CARES Act funding will go to students*, Full  
Court Press (Apr. 27, 2020), <https://tinyurl.com/yaaawjtz>.

26 <sup>18</sup> May 21, 2020 CARES Act: Higher Education Emergency Relief Fund Updated  
Statement, U.S. Dep’t of Educ., <https://tinyurl.com/y4mnboee> (last visited Nov. 2, 2020).

27 <sup>19</sup> Defendants presented the IFR to this Court on June 11, 2020, before it was published in  
28 the Federal Registrar, and it was considered as part of this Court’s PI Order.

112. DoE's eligibility requirements, as communicated through DoE's HEERF Assistance Guidances, public representations, the IFR, and its representations during this litigation, cannot be reconciled with, among other things: (a) the prior DoE April 9 letter guidance stating that higher education institutions had the discretion to distribute HEERF Assistance to *all* students, (b) the Certification regarding Student Assistance; (c) DoE's HEERF formula methodology; or (d) congressional intent reflected in the CARES Act.

113. By seeking to impose Title IV's and § 1611's eligibility requirements, DoE would exclude, among other non-citizens, students who are DACA recipients, Temporary Protected Status recipients, and asylum applicants. *See* 20 U.S.C. § 1091 (Title IV's eligibility requirements); 8 U.S.C. §§ 1611(a), 1641(b) (describing the only non-citizens who are eligible for receipt of "Federal public benefits"). DoE's eligibility requirements would also exclude, among others, students who are citizens or non-citizens who otherwise would be eligible for assistance, but who: (a) are still completing high school (dual-enrollment); (b) do not have a high school diploma, General Educational Development (GED) certification or recognized equivalent or exception; (c) already have a bachelor's degree; (d) are enrolled exclusively as non-credit students; (e) do not meet academic progress standards; or (f) are in default on a federal student loan or owe any refund relating to a federal student grant.

114. These limitations would likely have excluded from HEERF Assistance eligibility over 800,000 of the 1.5 million California Community College students enrolled when the pandemic struck, and similarly, would likely exclude more than half (over 750,000) of the approximately 1.4 million students enrolled in the current Fall 2020 semester. These would include many students identified as economically disadvantaged, almost 40 percent of the colleges' students with disabilities, half of those students who are veterans or training to be first responders, and over 40 percent of those students training for health services careers. In numbers, for the Fall 2020 semester, the California Community College students that DoE would render ineligible are estimated to include: more than 115,000 economically disadvantaged students; more than 25,000 students with disabilities; over 11,000 veterans—and nearly 2,000 active duty service members; approximately 107,000 students training for essential work in health services;

1 and an estimated 80,000 students training to be first responders.

2 **IV. DoE’S IMPOSITION OF THE ELIGIBILITY RESTRICTIONS THROUGH THE IFR**  
 3 **COMPOUNDS THE AGENCY’S UNLAWFUL CONDUCT**

4 115. On June 17, 2020, this Court preliminarily enjoined the imposition and  
 5 enforcement of DoE’s Title IV and § 1611 eligibility requirements on HEERF Assistance for  
 6 community colleges throughout California. PI Order at 28. In that Order, the Court determined  
 7 that Plaintiffs were likely to succeed on their claims that DoE’s eligibility requirements violate  
 8 separation of powers principles, the Spending Clause, and the APA. *Id.* at 18-19, 24. The  
 9 preliminary injunction enjoined the enforcement of the requirements in the April 21 Guidances,  
 10 the May 21 Update, and the IFR.

11 116. As this Court already ruled, the IFR fails to establish that DoE possesses the  
 12 statutory authority to impose the eligibility restrictions. Separately, the policy justifications for  
 13 the eligibility restrictions in the IFR are based on unsupported assumptions and a flawed cost-  
 14 benefit analysis, and reflect a failure to consider important aspects of the problem and evidence  
 15 before the agency at the time the IFR was issued, all in violation of the APA’s prohibition on  
 16 arbitrary and capricious conduct. DoE has compounded its APA violation by failing to consider  
 17 approximately 4,150 public comments that were submitted in response to DoE’s call for  
 18 comments, which predominantly opposed the IFR.

19 **A. The IFR Provides No Persuasive Justification for Imposing the Eligibility**  
 20 **Restrictions on HEERF Assistance**

21 117. The IFR’s contention that the eligibility restrictions are statutorily authorized is  
 22 predicated on two incorrect legal premises: that the DoE Secretary possesses the statutory  
 23 authority to promulgate a rule imposing eligibility restrictions on HEERF Assistance and that the  
 24 term “students” in the CARES Act is ambiguous. 85 Fed. Reg. at 36,495-96. First, the IFR does  
 25 not identify any delegation from Congress to issue rules arising from the CARES Act itself.  
 26 Instead, the IFR invokes the DoE Secretary’s general statutory authority to issue rules in  
 27 connection with her functions. *Id.* at 36,495-96 (citing 20 U.S.C. §§ 1221e-3, 3474). Such  
 28 authority for regulating administrative functions, however, does not authorize the imposition of

1 substantive requirements or funding conditions. *See Gonzalez v. Oregon*, 565 U.S. 243, 259,  
 2 264-65 (2006); *City of Chicago v. Sessions*, 888 F.3d 272, 287 (7th Cir. 2018) (imposing grant  
 3 conditions “is a tremendous power of widespread impact” and “not the type of authority that  
 4 would be hidden in a clause without explanation, and without any reference or acknowledgement  
 5 of that authority in the statute that actually contains the grant itself”).

6 118. Second, the term students is not ambiguous. “[T]he statutory formula expressly  
 7 provides for the inclusion of [full time enrollment] students who were not Federal Pell Grant  
 8 recipients, *i.e.*, students who would be ineligible for title IV aid.” PI Order at 17-18. Defendants’  
 9 interpretation of the CARES Act would give two different meanings to the term “students” within  
 10 § 18004, where subsection (a), governing the formula, would include students not eligible under  
 11 Title IV or § 1611, but subsection (c), governing the distribution of HEERF Student Assistance,  
 12 would exclude students not eligible under Title IV or § 1611. This Court already concluded that  
 13 “[s]uch an interpretation makes little sense and violates fundamental tenants of statutory  
 14 interpretation.” *Id.* at 18 (citing *City of Los Angeles v. Barr*, 941 F.3d 931, 941 (9th Cir. 2019)).

15 119. The IFR, additionally, makes a critical concession that dooms the Title IV  
 16 eligibility restrictions. The IFR acknowledges that the “emergency financial aid grants” that are a  
 17 part of HEERF Assistance “by definition, do not constitute Federal financial student aid under the  
 18 HEA, including title IV of the HEA.” 85 Fed. Reg. at 36,496. This necessarily means that  
 19 HEERF Assistance cannot be subject to Title IV’s restrictions because Title IV’s restrictions only  
 20 apply to grants “*under* [Title IV].” 20 U.S.C. § 1091(a) (emphasis added). The IFR’s discussion  
 21 that grants authorized by 20 U.S.C. § 1138(d) are subject to Title IV’s eligibility restrictions only  
 22 further underscores that Title IV’s restrictions do not apply to HEERF. 85 Fed. Reg. at 36,496.  
 23 Congress *explicitly* incorporated Title IV’s eligibility requirements in 20 U.S.C. § 1138(d) by  
 24 providing that “students who do not meet the requirements of section 1091(a) of this title” are  
 25 ineligible for that funding source. No such language appears in § 18004 of the CARES Act.

26 120. The IFR discusses instances in which the CARES Act incorporates certain  
 27 elements of Title IV, but the IFR fails to identify—nor can it—where Congress incorporated Title  
 28 IV’s eligibility requirements into the provisions surrounding HEERF Assistance. 85 Fed. Reg. at

36,496-97. Congress’s incorporation of some elements of Title IV with “surgical precision,” but not Title IV’s eligibility requirements, demonstrates that Congress consciously declined to adopt such requirements for HEERF Assistance. *Navajo Nation v. HHS*, 325 F.3d 1133, 1139-40 (9th Cir. 2003).

121. Finally, the IFR provides only a cursory explanation for the § 1611 eligibility restrictions. 85 Fed. Reg. at 36,496. The IFR reflects no consideration of the legal analysis relevant to this Court’s conclusion that HEERF Assistance is not a federal public benefit, the CARES Act’s more specific provisions govern over the general prohibition in § 1611, and § 1611’s purposes are not furthered by application of that statute to HEERF Assistance. PI Order at 22-24.

**B. The IFR Demonstrates that DoE’s Eligibility Restrictions on HEERF Assistance Violate the APA**

122. Even if DoE was statutorily permitted to impose the eligibility restrictions, the IFR confirms that they were imposed in an arbitrary and capricious manner because: (1) the IFR does not resolve the DoE’s internal inconsistencies; (2) the IFR’s policy justifications are premised on flawed assumptions; (3) the IFR altogether fails to consider important aspects of the problem; and (4) the DoE does not consider any of the public comments it solicited as part of the IFR.

123. The IFR does not resolve the internal inconsistencies with the DoE’s imposition of the eligibility requirements discussed *supra* at 26-30. Moreover, while the IFR contends that its restrictive definition of “students” would provide “the most efficient, effective, and expedient way possible” to award HEERF Assistance, it simultaneously suggests that institutions of higher education develop an alternative system to determine Title IV eligibility for those students who have not submitted a FAFSA. 85 Fed. Reg. at 36,497, 36,500-01. Such a process defeats any efficiency purportedly gained by the IFR. The IFR also ignores the obvious, more efficient alternative: if no eligibility restrictions were imposed, higher education institutions would not have to “wade through a litany of specific questions,” as the institutions would only have to determine whether the grant to a particular student cover “expenses related to the disruption of campus operations due to coronavirus,” as directed in the statute and originally contemplated by

1 the agency. *Id.* at 36,497; 134 Stat. at 568, § 18004(c).<sup>20</sup>

2 124. Furthermore, the IFR’s policy justification rests on three defective assumptions.  
 3 First, it claims that the eligibility requirements are necessary because “the potential for waste,  
 4 fraud, and abuse is significant when institutions of higher education are given the opportunity to  
 5 quickly make cash awards to students,” which DoE posits will incentivize institutions “to further  
 6 their bottom lines” and increase enrollment. 85 Fed. Reg. at 36,497-98. But the IFR does not  
 7 explain how limiting HEERF Assistance to Title IV and § 1611 eligible students prevents “waste,  
 8 fraud, and abuse.” To support DoE’s concern about fraud, DoE cites to one report claiming that  
 9 “[a] group of international fraudsters” have used information obtained from cyber hacks to file  
 10 unemployment claims about U.S. citizens. *Id.* at 36,497.<sup>21</sup> These allegations are unrelated to the  
 11 HEERF eligibility restrictions, and rather than support the restriction, they show that claims on  
 12 behalf of individuals who are eligible for financial aid under Title IV, such as U.S. citizens, are as  
 13 or more likely to be susceptible to fraud than claims made on behalf of individuals who are in-  
 14 eligible under Title IV.

15 125. Relatedly, DoE provides no support for the speculative assumption that without  
 16 the eligibility restrictions, “unscrupulous institutions could create cheap classes and programming  
 17 that provides little or no educational value and then use the HEERF grant funding to incentivize  
 18 individuals not qualified under Title IV to enroll as paying students in those classes and  
 19 programs, thereby qualifying for a grant.” 85 Fed. Reg. at 36,498. Conversely, the agency failed  
 20 to consider how the eligibility restrictions hinder the ability of higher education institutions “to  
 21 ensure that their currently enrolled students have the resources they need to continue their  
 22 studies” at a time when institutions face dwindling resources to address their students’ increased  
 23 needs as a result of the pandemic.<sup>22</sup> While the eligibility restrictions in no way guard against

24 <sup>20</sup> See also Secretary DeVos Letter to College and University Presidents, U.S. Dep’t of  
 25 Educ. (April 9, 2020), <https://tinyurl.com/y7f9tlrk> (“The only statutory requirement is that the  
 26 funds be used to cover expenses related to the disruption of campus operations due to  
 27 coronavirus.”).

27 <sup>21</sup> Citing Mike Baker, *Feds Suspect Vast Fraud Network Is Targeting U.S. Unemployment*  
 28 *Systems*, New York Times (May 16, 2020), <https://tinyurl.com/ycshl3kr>.

<sup>22</sup> California Community Colleges, Comment on Interim Final Rule *Eligibility of Students*



1 waste, fraud, and abuse, they undermine the very purpose of the CARES Act, which, as DoE  
 2 previously acknowledged, was to “provide[] institutions with significant discretion” on allocating  
 3 funds to students “as quickly as possible.”<sup>23</sup>

4 126. Second, the cost-benefit analysis conducted by the agency in the IFR is  
 5 fundamentally flawed. The IFR “evaluate[d] the costs and benefits of the IFR compared to a pre-  
 6 statutory baseline,” *i.e.*, the situation that existed before the CARES Act was enacted. 85 Fed.  
 7 Reg. at 36,499. Contrary to the IFR’s assertion, this baseline is *not* “[i]n accordance with OMB  
 8 Circular A-4,” *id.*, which directs that the “baseline should be the best assessment of the way the  
 9 world would look absent the proposed action.”<sup>24</sup> Without the IFR, DoE would still be required by  
 10 the CARES Act to allocate funds to higher education institutions. Instead, the correct baseline is  
 11 to compare the costs and benefits of imposing the eligibility requirements against not imposing  
 12 them, as that is the “best assessment of the way the world would look absent the proposed  
 13 action.” *Id.* By relying on a flawed baseline, DoE inappropriately takes credit for the funding  
 14 that was appropriated by Congress, while neglecting to consider the costs associated with  
 15 restricting 4.6 million students from receiving this emergency assistance. *See* 85 Fed. Reg. at  
 16 36,498-502; *see also Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012)  
 17 (“[W]hen an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious  
 18 flaw undermining that analysis can render the rule unreasonable.”).

19 127. Third, the agency relies on grossly inaccurate estimates of the burden on higher  
 20 education institutions and students to comply with these eligibility restrictions. 85 Fed. Reg. at  
 21 36,503. The IFR asserts, without support, that each higher education institution which receives a  
 22

23 *at Institutions of Higher Education for Funds Under the Coronavirus Aid, Relief, and Economic*  
 24 *Security (CARES) Act*, 85 Fed. Reg. 36,494 (June 17, 2020), RIN: 1840-ZA04 (hereinafter  
 25 Comment on IFR), ID No. ED-2020-OPE-0078-2928 (Attachment 1), 13, (July 17, 2020)  
 (California Community Colleges Comment); *see also* State Attorneys General, Comment on IFR,  
 ID No. ED-2020-OPE-0078-2873 (Attachment 1), 11-13 (July 17, 2020) (State AGs Comment)  
 (noting projected \$765 billion cuts to state budgets over the next 3 years).

26 <sup>23</sup> Secretary DeVos Letter to College and University Presidents, U.S. Dep’t of Educ. (Apr.  
 27 9, 2020), <https://tinyurl.com/y7f9tlrk>.

28 <sup>24</sup> Office of Mgmt. & Budget, Circular A-4 (Sept. 17, 2003),  
<https://tinyurl.com/y3v8wzjp>.

1 HEERF Assistance allocation will only require five hours to implement these eligibility  
 2 requirements, which the IFR describes as consisting of “set[ting] up any new form for students to  
 3 complete” and “establish[ing] review and recordkeeping procedures.” *Id.* Even if that estimate  
 4 was accurate for those particular tasks—which higher education institutions in California and  
 5 across the country represent it is not—the IFR does not account for the numerous other tasks that  
 6 are implicated by the eligibility requirements such as: (1) manually reviewing each application  
 7 and verifying that the student is eligible under each of the criteria for receipt of financial aid  
 8 under Title IV; (2) following up with students for additional information required under the  
 9 eligibility requirements; (3) handling appeals associated with the eligibility requirements; and (4)  
 10 instructing students seeking to establish Title IV eligibility on how to complete the FAFSA or any  
 11 alternative application form that an institution may create to determine eligibility.<sup>25</sup>

12 128. The IFR’s estimate that it would take students twenty minutes to complete the  
 13 request for assistance under DoE’s eligibility requirements is also inaccurate and contrary to the  
 14 evidence before the agency at the time of the IFR. 85 Fed. Reg. at 36,503. The IFR cites claims  
 15 that one of the benefits of the Title IV eligibility requirement is that it allows for the “leveraging  
 16 [of] existing processes and procedures,” so “students who currently do not receive title IV aid  
 17 [could] submit the [FAFSA] in order to determine title IV eligibility.” *Id.* at 36,497. The IFR  
 18 acknowledges, though, that students “may lack the necessary information or familiarity with the  
 19 financial aid process” to submit the FAFSA. *Id.* at 36,500. The IFR continues that the  
 20 “complexity” of FAFSA and “lack of counseling” pose “particular[] challenge[es] for low-  
 21 income, minority, and first-generation students.” *Id.* According to DoE’s own data, nearly three  
 22 million undergraduates did not fill out a FAFSA in 2015-16, including hundreds of thousands of  
 23 Black students, Latino students, and low-income veteran students.<sup>26</sup>

24 <sup>25</sup> California Community Colleges Comment at 13-15; State AGs Comment at 10-11; San  
 25 Jose State University, Comment on IFR, ID No. ED-2020-OPE-0078-2868 (Attachment 1), 6-7,  
 26 (July 17, 2020) (San Jose State Comment); National Association of Student Financial Aid  
 Administrators, Comment on IFR, ID No. ED-2020-OPE-0078-2990 (Attachment 1), 4, (July 17,  
 2020) (NASFAA Comment).

27 <sup>26</sup> The Institute for College Access & Success, Comment on IFR, ID No. ED-2020-OPE-  
 28 0078-2608 (Attachment 1), 2-3 (July 8, 2020) (ICAS Comment) (compiling DoE data).

129. In fact, the FAFSA form itself estimates that it will take students an average of 1.5 hours to complete the form, far exceeding the twenty minute estimate in the IFR.<sup>27</sup> The IFR's alternative suggestion for higher education institutions to create a separate form and procedure for students not willing or able to submit a FAFSA to attest to their Title IV eligibility under penalty of perjury, is no alternative at all. 85 Fed. Reg. at 36,500. Students would still have to familiarize themselves with the "complex" financial process before undertaking the serious step of verifying eligibility under penalty of perjury, a process that will take more than twenty minutes.<sup>28</sup> Because of the burden and the prospect of making an unnecessary certification, many students who are *eligible* for financial aid under Title IV will likely not apply for this emergency assistance, an outcome that the IFR fails to consider.<sup>29</sup>

130. In addition to the above, the IFR fails entirely to consider other significant problems:

- The groups of students who are excluded from receiving HEERF Assistance by DoE's eligibility requirements are suffering the disproportionate health and economic effects as a result of the pandemic, while also being less likely to have access to health insurance, and thus, would likely benefit most from HEERF Assistance;<sup>30</sup>
- The eligibility restrictions will exacerbate already existing gaps in equity and

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<sup>27</sup> FAFSA, Free Application for Federal Student Aid, July 1, 2020 – June 30, 2021 2, U.S. Dep't of Educ., <https://tinyurl.com/y6z5u2lm> (last visited Nov. 2, 2020).

<sup>28</sup> NASFAA Comment at 4; San Jose State Comment at 5; The Century Foundation Comment on IFR, ID No. ED-2020-OPE-0078-2927 (Attachment 1), 1 (July 17, 2020) (Century Foundation Comment).

<sup>29</sup> San Jose State Comment at 4-5; Coalition for Humane Immigrant Rights, Comment on IFR, ID No. ED-2020-OPE-0078-0055 (Attachment 1), 7-10 (July 17, 2020) (CHIRLA Comment); Student Veterans of America, Comment on IFR, ID No. ED-2020-OPE-0078-2874 (Attachment 1), 3-4 (July 17, 2020) (SVA Comment); Leadership Conference on Civil and Human Rights, Comment on IFR, ID No. ED-2020-OPE-0078-2907 (Attachment 1), 2-3 (July 17, 2020) (LCCHR Comment).

<sup>30</sup> *E.g.*, CHIRLA Comment at 2-7; ICAS Comment at 3-4; San Jose State Comment at 2-3; LCCHR Comment at 1-2; County of Los Angeles, Comment on IFR, ID No. ED-2020-OPE-0078-2549, 10 (July 17, 2020) (LA County Comment); University of California, Comment on IFR, ID ED-2020-OPE-00078-1091 (Attachment 1), 2 (July 17, 2020) (UC Comment).

achievement, making it more likely that traditionally underrepresented student groups will dis-enroll;<sup>31</sup>

- The eligibility restrictions, and the dis-enrollment of ineligible students that would likely follow, will deprive higher education institutions of valuable members of their communities, undermine the institutions' missions of promoting diversity, and hinder institutions' efforts to prepare all students for a diverse workforce and society;<sup>32</sup> and
- The dis-enrollment of ineligible students that would likely follow the eligibility restrictions will have a devastating effect on national and local economies, significantly diminishing productivity capacity, decreasing the eligible tax base, and harming the country's international competitiveness at a time when a highly skilled workforce is needed to support an economic recovery.<sup>33</sup>

131. Finally, DoE violates the APA for another independent reason. There were a total of approximately 4,150 public comments, which overwhelmingly opposed the IFR. Although DoE invited public comments and represented that it would "consider these comments in determining whether to revise the rule," 85 Fed. Reg. at 36,495, DoE failed to consider any of the public comments that were submitted in response to the IFR, evident by their exclusion from the administrative record, *see* ECF No. 52-3.

**V. DOE'S UNLAWFUL RESTRICTIONS ON HEERF ASSISTANCE ELIGIBILITY WOULD IRREPARABLY HARM PLAINTIFFS AND STUDENTS ATTENDING COMMUNITY COLLEGES THROUGHOUT CALIFORNIA**

132. DoE's unlawful eligibility requirements would unfairly and erroneously limit which students may receive emergency assistance during a global pandemic, inflicting irreparable harm on Plaintiffs and their students by damaging students' access to education, with

<sup>31</sup> *E.g.*, California Community Colleges Comment at 5; San Jose State Comment at 8; State AGs Comment at 16.

<sup>32</sup> *E.g.*, California Community Colleges Comment at 13; CHIRLA Comment at 11-12; San Jose State Comment at 7-8; State AGs Comment at 16.

<sup>33</sup> *E.g.*, California Community Colleges Comment at 5; LA County Comment at 11-13; Century Foundation Comment at 1; SEIU, Comment on IFR, ID No. ED-2020-OPE-0078-0723 (Attachment 1) (SEIU Comment)

1 consequential effects on their well-being and futures. To mitigate this damage, Plaintiffs would  
2 be required to identify immediate additional resources to determine how to disburse funding to  
3 the many students rendered ineligible for HEERF Assistance, depleting Plaintiffs' resources  
4 intended for other programs and services. DoE's limitations would also serve to place students  
5 already in need at a higher risk of dis-enrolling, which would threaten Plaintiffs' budgets and  
6 revenues, and undermine their academic missions and the character and diversity of their student  
7 bodies. Failure to follow DoE's eligibility requirements conveyed most recently in its IFR would  
8 subject Plaintiff Districts to the threat of suspension or debarment, and the attendant loss of  
9 unrelated federal funding.

10 133. The DoE's confusing and conflicting guidances regarding student eligibility placed  
11 a significant administrative burden on Plaintiff Districts' financial aid offices at a time when staff  
12 were working remotely and without access to resources available in their offices—a burden that  
13 would re-emerge if Plaintiffs were once again subject to DoE's eligibility requirements. Before  
14 the Court issued its PI Order, Plaintiff Districts had to re-direct staff or revise plans to disburse  
15 HEERF Assistance in as equitable and expedient a manner as possible despite DoE's eligibility  
16 restrictions, which entailed long hours and substantial resources. Imposing the same  
17 requirements as federal student aid entails the consideration of a long list of conditions, from not  
18 having defaulted on student loan payments to making sufficient satisfactory academic progress.  
19 While the FAFSA application contains information regarding Title IV eligibility, many students,  
20 including low-income students, have not filled out a FAFSA. That means a manual review of  
21 each student's records is the only way to ensure that assistance is distributed to the greatest  
22 number of students possible while complying with DoE's restrictive eligibility requirements.  
23 Many colleges do not have the time and resources to undertake this review. This extra burden  
24 would come at a time when Plaintiffs are already devoting considerable resources to support their  
25 students' needs during this crisis, including increased demand for academic counseling, mental  
26 health services, and food services.

27 134. Because the HEERF Assistance eligibility restrictions imposed by DoE would  
28 leave thousands of students enrolled in Plaintiff Districts' institutions without relief, Plaintiffs

1 would be required, absent an injunction, to consider re-directing funds from other grants or  
2 programs (such as the SEA Program, discussed *supra* at 8-10) to cover the costs. These  
3 alternative sources, however, would not provide enough funds to bridge the gap caused by DoE's  
4 HEERF eligibility requirements, and would decrease the amount of funding available to Plaintiffs  
5 for educational programs and services overall.

6 135. DoE's eligibility restrictions would also increase the risk of student dis-enrollment  
7 that Plaintiffs face as a result of the COVID-19 pandemic. And dis-enrollment has both short and  
8 long term deleterious effects. The immediate impact of dis-enrollment would be felt in  
9 allocations of funds to community college districts for categorical programs, which total hundreds  
10 of millions of dollars and are apportioned based solely upon fulltime equivalent attendance  
11 (FTE). General apportionment funding is based upon a recently-enacted funding formula that  
12 includes FTE and other metrics of success. Dis-enrollments would adversely impact college  
13 district revenues under this formula by decreasing three-year average attendance figures and  
14 lowering college success metrics which are weighted toward vulnerable student populations who  
15 are most likely in need of the CARES Act emergency relief to stay enrolled. Student drop-outs  
16 also affect the diversity of the student population, the robustness and quality of classroom  
17 participation, and the overall academic climate.

18 136. Because Plaintiff Districts' budgets are determined, in large part, by the number of  
19 students enrolled, decreases in enrollment have a significant effect on the types of academic  
20 courses Plaintiffs are able to provide, the staff they are able to hire, and the educational programs  
21 and services they are able to offer. It also affects the level of financial assistance Plaintiff  
22 Districts are able to provide students in the future.

23 137. Before the April 21 Guidances, the four colleges in Plaintiff LRCCD, Clovis,  
24 Reedley, and Fresno City Colleges in Plaintiff SCCCD, and Foothill College in FDCCD executed  
25 the required Certifications agreeing to comply with all terms and conditions of funding, in  
26 reliance on the plain text of the CARES Act, the representations made in DoE's April 9 letter, and  
27 the language of the Certifications. These colleges signed the Certifications with the intention and  
28 plan of using HEERF Assistance to be available across their entire student population, without

1 regard to Title IV’s eligibility requirements. None of these colleges had any knowledge that they  
 2 would be required to exclude HEERF Assistance from non-Title IV eligible students when they  
 3 executed the Certifications.

4 138. If DoE’s eligibility requirements do not remain enjoined, all of the Plaintiff  
 5 Districts would risk prospective penalties and liabilities if they were to continue implementing  
 6 their HEERF Assistance distribution plans. The Certifications that all educational institutions  
 7 were required to sign as a condition of receiving CARES Act funding incorporate federal  
 8 regulations concerning suspension and debarment, among other legal authorities. These  
 9 regulations threaten the recipient with loss of not just DoE funding, but all federal funding, if they  
 10 are found to have willfully failed to comply with the terms of the Certifications. 2 C.F.R.  
 11 § 180.800. Thus, Plaintiff Districts, if subject to the eligibility requirements, would be faced with  
 12 an impossible choice: deny thousands of students needed assistance in order to comply with  
 13 eligibility requirements (requirements that were imposed *after* some of their colleges signed the  
 14 Certifications), or risk their federal funding in its entirety.

### 15 **FIRST CLAIM FOR RELIEF**

#### 16 **VIOLATION OF SEPARATION OF POWERS PRINCIPLES**

17 139. Plaintiffs incorporate the allegations of the preceding paragraphs by reference.

18 140. Article I, Section I of the U.S. Constitution enumerates that “[a]ll legislative  
 19 Powers here granted shall be vested in [the] Congress.”

20 141. Article I, Section VIII of the U.S. Constitution vests exclusively in Congress the  
 21 spending power to “provide for . . . the general Welfare of the United States.”

22 142. The executive branch’s authority to act “must stem either from an act of Congress  
 23 or from the Constitution itself.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585  
 24 (1952).

25 143. By imposing eligibility requirements on HEERF Assistance despite Congress  
 26 delegating no authority for Defendants to impose such restrictions on these funds, Defendants  
 27 have violated constitutional separation of powers principles. “Absent congressional  
 28 authorization, the Administration may not redistribute or withhold properly appropriated funds in



order to effectuate its own policy goals.” *See City & Cty. of San Francisco v. Trump*, 897 F.3d 1225, 1235 (9th Cir. 2018). Nor may it impose conditions on funds appropriated by Congress without authorization by Congress. *See id.* at 1233-34.

144. For the reasons stated herein, Plaintiffs are entitled to: (a) a declaration that the Title IV and § 1611 eligibility requirements set forth in DoE’s HEERF Assistance Guidances and IFR are unconstitutional, and thus, should be set aside under 28 U.S.C. § 2201; and (b) a permanent injunction prohibiting the imposition and enforcement of those eligibility requirements. Additionally, the Plaintiff Districts are entitled to a writ of mandate under 28 U.S.C. § 1361 to compel Defendants to issue HEERF Assistance funds to the Plaintiff Districts without such funds being subject to the eligibility requirements set forth in the HEERF Assistance Guidances and IFR.

## **SECOND CLAIM FOR RELIEF**

### **ULTRA VIRES**

145. Plaintiffs incorporate the allegations of the preceding paragraphs by reference.

146. An agency acts *ultra vires* when it exceeds its statutory authority conferred by Congress.

147. There is no provision of the CARES Act that imposes eligibility requirements on the students who may receive HEERF Assistance. Further, Congress has not delegated to Defendants the authority to impose such eligibility requirements.

148. No provision in the CARES Act imposes Title IV’s or § 1611’s limitations on HEERF Assistance. Moreover, Congress did explicitly limit eligibility for other forms of assistance in the CARES Act, while not doing the same for HEERF Assistance.

149. The CARES Act requires Defendants to issue HEERF Assistance funds to Plaintiff Districts based on a funding formula and without conditioning funding on Plaintiffs’ agreement to impose Title IV or § 1611 eligibility requirements. Indeed, the formula described in subsection (a) of § 18004 of the CARES Act encompasses those “students” “who were *not* Federal Pell Grant recipients,” therefore including students who are not eligible to receive financial aid under Title IV or eligible to receive federal public benefits under § 1611. Subsection (c) of § 18004

1 then authorizes institutions to use HEERF Assistance to cover the costs of instruction associated  
 2 with the coronavirus and mandates that institutions “shall use no less than 50 percent” of the  
 3 funds “for emergency financial aid grants *to students*” for eligible expenses related to the  
 4 coronavirus.

5 150. DoE’s exclusion of students who are ineligible under Title IV or § 1611 from  
 6 receiving the emergency assistance provided under subsection (c) would give two different  
 7 meanings to the term “students” found in subsections (a) and (c), leading to illogical and  
 8 unintended results. *See Los Angeles*, 941 F.3d at 941 (“Under the normal rule of statutory  
 9 construction, we presume that identical words used in different parts of the same act are intended  
 10 to have the same meaning.”) (internal quotation marks omitted).

11 151. Section 1611’s general restrictions on the receipt of federal public benefits also do  
 12 not apply to the specific one-time emergency funding disbursement in the CARES Act. The  
 13 formula’s inclusion of students, irrespective of § 1611’s restrictions, is strong evidence that  
 14 Congress intended that § 1611’s restrictions not apply to HEERF Assistance. Section 1611’s  
 15 objectives to “remove the incentive for illegal immigration provided by the availability of public  
 16 benefits,” 8 U.S.C. § 1601(6) and “limit[] lifetime welfare benefits,” H.R. Rep. No. 104-651 at 3  
 17 (1996), is not furthered by its application to HEERF Assistance. HEERF Assistance is also not a  
 18 federal public benefit under § 1611, which is particularly evident from a review of the Institution  
 19 Assistance, because § 1611 does not encompass “block grants” or funding sources that are  
 20 “generally targeted to communities.” 63 Fed. Reg. 41,658, 41,659 (Aug. 4, 1998).

21 152. For the reasons stated herein, Plaintiffs are entitled to: (a) a declaration that the  
 22 Title IV and § 1611 eligibility requirements set forth in DOE’s HEERF Assistance Guidances and  
 23 IFR are *ultra vires* under the CARES Act, and thus, should be set aside under 28 U.S.C. § 2201;  
 24 and (b) a permanent injunction prohibiting the imposition and enforcement of those eligibility  
 25 requirements. Additionally, the Plaintiff Districts are entitled to a writ of mandate under 28  
 26 U.S.C. § 1361 to compel Defendants to issue HEERF Assistance funds to the Plaintiff Districts  
 27 without such funds being subject to the eligibility requirements set forth in the HEERF Assistance  
 28 Guidances and IFR.

**THIRD CLAIM FOR RELIEF**

**SPENDING CLAUSE**

153. Plaintiffs incorporate the allegations of the preceding paragraphs by reference.

154. The Constitution affords the spending power to Congress. U.S. Const., art. I, § 8, cl. 1. Congress’s spending power is not unlimited. When “Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation,’ and by placing conditions that are related ‘to the federal interest in particular national projects or programs.’” *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (internal citations omitted, brackets in original).

155. To the extent that Congress delegated its authority to DoE to impose its own eligibility conditions on HEERF Assistance (which it has not), the eligibility requirements set forth in the DoE’s HEERF Assistance Guidances and IFR violate the Spending Clause of the U.S. Constitution.

156. The eligibility requirements set in DoE’s HEERF Assistance Guidances and the IFR violate the relatedness requirement under the Spending Clause because they are contrary to Congress’s intent in the CARES Act to confer maximum flexibility on higher education institutions to provide financial assistance in the manner that best serves each of their respective student populations during this public health crisis.

157. The eligibility requirements set forth in DoE’s HEERF Assistance Guidances and the IFR, and the required Certifications, violate the unambiguous requirement under the Spending Clause for three reasons. First, Congress has not “unambiguously” imposed the eligibility requirements. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Second, DoE’s conflicting interpretations fail to provide the Districts with the requisite notice enabling them to “knowingly decide” how to use HEERF Assistance funds. *Id.* at 24. Third, as to at least eight colleges in Plaintiff Districts, Defendants have surprised them with “post acceptance . . . conditions” by imposing the Title IV eligibility requirements *after* those colleges executed the required Certifications. *Id.* at 25.

158. For the reasons stated herein, Plaintiffs are entitled to: (a) a declaration that the Title IV and § 1611 eligibility requirements set forth in DOE’s HEERF Assistance Guidances and IFR violate the Spending Clause, and thus, should be set aside under 28 U.S.C. § 2201; and (b) a permanent injunction prohibiting the imposition and enforcement of those eligibility requirements. Additionally, the Plaintiff Districts are entitled to a writ of mandate under 28 U.S.C. § 1361 to compel Defendants to issue HEERF Assistance funds to the Plaintiff Districts without such funds being subject to the eligibility requirements set forth in the HEERF Assistance Guidances and IFR.

#### **FOURTH CLAIM FOR RELIEF**

##### **VIOLATION OF ADMINISTRATIVE PROCEDURE ACT**

##### **(Constitutional Violations and Excess of Statutory Authority)**

159. Plaintiffs incorporate the allegations of the preceding paragraphs by reference.

160. Defendant DoE is an “agency” under the APA, 5 U.S.C. § 551(1), and the HEERF Assistance Guidances, the IFR, and the imposition of HEERF eligibility requirements set forth therein are “agency action[s]” under the APA, *id.* § 551(13).

161. The imposition of the eligibility requirements in the HEERF Assistance Guidances and the IFR constitute “[a]gency action[s] made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” *Id.* § 704.

162. The APA requires that a court “hold unlawful and set aside agency action, findings, and conclusion found to be . . . contrary to constitutional right, power, privilege, or immunity,” or “in excess of statutory jurisdiction, authority, or limitation, or short of statutory right.” *Id.* § 706(2)(B)-(C).

163. As explained above, the eligibility requirements set in the HEERF Assistance Guidances and IFR: (a) are unconstitutional because Defendants overstepped their powers by imposing funding conditions without any authority to do so; (b) are in excess of statutory authority under the CARES Act; and (c) violate the Spending Clause because they are unrelated to the federal purpose of the CARES Act and/or fail the Clause’s unambiguous requirement.

164. For the reasons stated herein, because Defendants acted in excess of their statutory

1 authority and unconstitutionally, Plaintiffs are entitled to: (a) a declaration that the Title IV and  
 2 § 1611 eligibility requirements set forth in DOE’s HEERF Assistance Guidances and IFR are  
 3 unlawful, and thus, should be set aside under 5 U.S.C. § 706; and (b) a permanent injunction  
 4 prohibiting the imposition and enforcement of those eligibility requirements. Additionally, the  
 5 Plaintiff Districts are entitled to a writ of mandamus under 28 U.S.C. § 1361 to compel  
 6 Defendants to issue HEERF Assistance funds to the Plaintiff Districts without such funds being  
 7 subject to the eligibility requirements set forth in the HEERF Assistance Guidances and IFR.

### 8 **FIFTH CAUSE OF ACTION**

#### 9 **VIOLATION OF ADMINISTRATIVE PROCEDURE ACT**

##### 10 **(Arbitrary and Capricious)**

11 165. Plaintiffs incorporate the allegations of the preceding paragraphs by reference.

12 166. Defendant DoE is an “agency” under the APA, 5 U.S.C. § 551(1), and the HEERF  
 13 Assistance Guidances, the IFR, and the imposition of HEERF eligibility requirements set forth  
 14 therein are “agency action[s]” under the APA, *id.* § 551(13).

15 167. The imposition of eligibility requirements in the HEERF Assistance Guidances  
 16 and the IFR constitute “[a]gency action[s] made reviewable by statute and final agency action for  
 17 which there is no other adequate remedy in a court.” *Id.* § 704.

18 168. The APA requires that a court “hold unlawful and set aside agency action,  
 19 findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or  
 20 otherwise not in accordance with law.” *Id.* § 706(2)(A).

21 169. The eligibility requirements set forth in the HEERF Assistance Guidances are  
 22 arbitrary and capricious and an abuse of discretion. As discussed *supra*, Defendants have acted in  
 23 an arbitrary and capricious manner by relying on factors that Congress did not intend, failing to  
 24 consider important aspects of the problem, and failing to provide an explanation for the April 21  
 25 HEERF Assistance Guidances that is consistent with the evidence that is before the agency. *See*  
 26 *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm. Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

27 170. Defendants have engaged in “[u]nexplained inconsistency” in first stating that  
 28 HEERF Assistance is available to all students, to only change their view without showing any

1 awareness of its changed position. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*,  
2 545 U.S. 967, 981 (2005).

3 171. The IFR is arbitrary and capricious because it is premised on speculative claims of  
4 fraud and an unsupported assessment of burden on higher education institutions that is contrary to  
5 the evidence before the agency. *See State Farm.*, 463 U.S. at 43 (“[T]he agency must examine  
6 the relevant data and articulate a satisfactory explanation for its action.”); *Nat'l Lifetime Ass'n v.*  
7 *FCC*, 921 F.3d 1102, 1115 (D.C. Cir. 2019) (agency action premised on “speculative”  
8 conclusions is arbitrary and capricious).

9 172. The cost-benefit analysis in the IFR is arbitrary and capricious for this reason and  
10 because it is predicated on flawed assumptions, including an incorrect baseline in which it fails to  
11 consider the costs of imposing the eligibility requirements compared to not imposing the  
12 eligibility requirements. *See Nat'l Ass'n of Home Builders*, 682 F.3d at 1039-40.

13 173. The IFR is also arbitrary and capricious because it fails to consider the harms of  
14 the eligibility requirements, both monetary and non-monetary, to: (a) students not eligible under  
15 Title IV or § 1611; (b) higher education institutions' academic missions of equity and diversity;  
16 and (c) national, state, and local economies due to the reduction in productivity that would likely  
17 follow as a result of the eligibility restrictions' impact on college graduation rates. *See, e.g., State*  
18 *Farm*, 463 U.S. at 43; *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 854 (9th Cir. 2020).

19 174. For the reasons stated herein, Plaintiffs are entitled to: (a) a declaration that the  
20 Title IV and § 1611 eligibility requirements set forth in DOE's HEERF Assistance Guidances and  
21 IFR are unlawful, and thus, should be set aside under 5 U.S.C. § 706; and (b) a permanent  
22 injunction prohibiting the imposition and enforcement of those eligibility requirements.  
23 Additionally, the Plaintiff Districts are entitled to a writ of mandamus under 28 U.S.C. § 1361 to  
24 compel Defendants to issue HEERF Assistance funds to the Plaintiff Districts without such funds  
25 being subject to the eligibility requirements set forth in the HEERF Assistance Guidances and  
26 IFR.

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28 ///

**SIXTH CAUSE OF ACTION**

**VIOLATION OF ADMINISTRATIVE PROCEDURE ACT**

**(Arbitrary and Capricious and Without Observance of Procedure Required by Law –  
Failure to Consider Public Comments)**

175. Plaintiffs incorporate the allegations of the preceding paragraphs by reference.

176. Defendant DoE is an “agency” under the APA, 5 U.S.C. § 551(1), and the HEERF Assistance Guidances, the IFR, and the imposition of HEERF eligibility requirements set forth therein are “agency action[s]” under the APA, *id.* § 551(13).

177. The imposition of eligibility requirements in the HEERF Assistance Guidances and the IFR constitute “[a]gency action[s] made reviewable by statute and final agency action for which there is no other adequate remedy in a court.” *Id.* § 704.

178. The APA requires that a court “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A). “The requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately . . . respond to ‘relevant’ and ‘significant’ public comments.” *Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 & n.58 (D.C. Cir. 1977)).

179. The APA also requires that a court set aside agency actions that are done “without observance of procedure required by law.” 5 U.S.C. § 706(2)(D). Even if an agency possesses “good cause” to promulgate an interim final rule that is effective before the consideration of public comments, the agency is not excused from ultimately completing the rulemaking process before the rule is “chiseled into bureaucratic stone.” *Am. Fed. of Gov’t Employees, AFL-CIO v. Block*, 655 F.2d 1153, 1157 (D.C. Cir. 1981). “[I]t is crucial that the comprehensive permanent regulations which follow emerge as a result of the promulgation of the congressionally-mandated policy of affording public participation that is embodied in [the APA].” *Id.* at 1158.

180. The DoE requested that the public comment on the IFR. There were approximately 4,150 public comments that were submitted in response to the IFR, which overwhelming opposed the IFR. The agency has shown no consideration of *any* of these public



1 comments.

2 181. The deadline for submission of the public comments was July 17, 2020. Although  
3 over three and a half months have passed since the deadline, the agency has taken no action to  
4 consider the validity of the IFR in light of the public comments.

5 182. For the reasons stated herein, Plaintiffs are entitled to: (a) a declaration that the  
6 Title IV and § 1611 eligibility requirements set forth in the IFR, which have been imposed  
7 without consideration of any of the public comments that were submitted in response to the IFR's  
8 solicitation of those comments, are unlawful, and thus, should be set aside under 5 U.S.C. § 706;  
9 and (b) a permanent injunction prohibiting the imposition and enforcement of those eligibility  
10 requirements. Additionally, the Plaintiff Districts are entitled to a writ of mandamus under 28  
11 U.S.C. § 1361 to compel Defendants to issue HEERF Assistance funds to the Plaintiff Districts  
12 without such funds being subject to the eligibility requirements set forth in the IFR.

### 13 **PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in their  
15 favor, and grant the following relief:

16 1. Issue a declaration that the Title IV and § 1611 eligibility requirements set forth in  
17 DOE's HEERF Assistance Guidances and IFR are unlawful and/or unconstitutional because they:  
18 (a) violate the separation of powers; (b) exceed congressional authority conferred to the executive  
19 branch and is ultra vires; (c) violate the Spending Clause; and (d) violate the APA;

20 2. Set aside the Title IV and § 1611 eligibility requirements set forth in the HEERF  
21 Assistance Guidances and IFR under 28 U.S.C. § 2201 and 5 U.S.C. § 706;

22 3. Permanently enjoin Defendants from imposing and enforcing the Title IV and  
23 § 1611 eligibility requirements set forth in the HEERF Assistance Guidances and IFR, or  
24 otherwise restricting eligibility for HEERF Assistance to only those who are eligible under Title  
25 IV of the Higher Education Act of 1965 or § 1611;

26 4. Permanently enjoin Defendants from penalizing Plaintiff Districts for distributing  
27 assistance to students who are not eligible under Title IV of the Higher Education Act of 1965 or  
28 § 1611;

1           5.       Issue a writ of mandate compelling Defendants to issue the Plaintiff Districts'  
2 HEERF Assistance funds without such funds being subject to the Title IV or § 1611 eligibility  
3 requirements set forth in the HEERF Assistance Guidances or IFR; and

4           6.       Grant such other relief as the Court may deem just and proper.  
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1 Dated: November 6, 2020

Respectfully submitted,

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43 *Community College District*

**ATTESTATION OF SIGNATURES**

I, Lee I. Sherman, hereby attest, pursuant to Local Civil Rule 5-1(i)(3) of the Northern District of California that concurrence in the filing of this document has been obtained from each signatory hereto.

/s/ Lee I. Sherman

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